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No. 90-479

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1990

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE; and JOHNANN ADEE, his wife; HOWARD W. ROBERTSON and PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE and DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for RANDALL LYNN HEIMANN, deceased, JAY DEE HEIMANN, GENE ALVIN HEIMANN and RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; and JOHNANN ADEE, in her capacity as Personal Representative of the ESTATE OF FRED P. HEIMANN, deceased,

*Petitioners,*

v.

AMOCO PRODUCTION COMPANY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATUTES

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## BRIEF OF RESPONDENT IN OPPOSITION

Respondent Amoco Production Company ("Amoco") submits this brief in opposition to the petition for a writ of certiorari filed by Petitioners ("the Heimanns").[1]

The Heimanns seek review of a unanimous decision of the Tenth Circuit Court of Appeals in a diversity proceeding. The Tenth Circuit, on the basis of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and applicable state law, held that the Heimanns were precluded from relitigating in federal court (under the guise of a common-law tort claim) the "fairness" of a resource unitization plan proposed by Amoco, which plan had been approved as "fair" to the Heimanns by both the state Oil Conservation Commission (OCC) and, on appeal, by the state's judiciary. Respondent's Appendix (Resp.App.) B, 30a. The court below held that when the OCC, empowered to rule on the fairness of a unitization plan, employing trial-like procedures and after full participation by the Heimanns, finds that a unitization plan adequately protects the interests of all participants, including the Heimanns, such approval is conclusive on the common-law issue of Amoco's "good faith." Resp.App. 46a. The Tenth Circuit reasoned:

> Were this court to permit the Heimanns to relitigate issues already decided in a fair hearing by the OCC and affirmed by the New Mexico Supreme Court, we would intrude upon the jurisdiction of those two bodies. This would contravene established principles of comity and federalism and, after three levels of review,

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[1] Amoco Production Company is a wholly owned subsidiary of Amoco Company. Amoco Company is a wholly-owned subsidiary of Amoco Corporation.

> undermine judicial economy. We are convinced that the determination by the OCC and the New Mexico Supreme Court that the Bravo Dome unitization plan was fair and protected the Heimanns correlative rights would be afforded collateral estoppel effect in the courts of New Mexico; full faith and credit requires that it be given similar treatment here.

Resp.App. 58a.

Amoco submits the Petition is untimely. Moreover, this case was decided correctly below and does not present an important question of federal law. Further review by this Court is not warranted.

## STATEMENT OF THE CASE

The Heimanns are lessors, and Amoco the lessee, under three private carbon dioxide leases in northeastern New Mexico.

Under the leases, the Heimanns retained a royalty equal to 12½% of the net proceeds received by Amoco from the sale of carbon dioxide produced from their lands. Each lease also contained a "unitization clause" in which the Heimanns unequivocally granted Amoco the right to consolidate the Heimanns' leasehold with other lands to form a common resource development and production unit, subject only to approval "by any governmental authority." The Heimanns' leases further provided that upon unitization, royalty was to be paid to them based on the allocation formula contained in the unit plan.

"Unitization" is the consolidation for development of mineral interests comprising a common source of supply. It is the result of effort by state legislatures to modify the common-law rule of capture which had previously applied to oil and gas law. The goals of unitization, as administered by the state, are conserving resources by preventing waste while simultaneously protecting landowners' correlative rights.[2] Resp.App. 37a.

In the late 1970's, Amoco initiated a program to enhance oil recovery in the United States by piping carbon dioxide from the area in which the Heimanns' property is located and injecting it into oil fields in West Texas. To accomplish that objective, Amoco developed a unit plan to unitize mineral interests in the "Bravo Dome" area of northeastern New Mexico. The Bravo Dome is a geological structure which contains a common source of carbon dioxide supply. The Heimanns' leases are located within the Bravo Dome. Amoco's Bravo Dome unit plan provided for payment of royalty to all participants based on a "surface acreage" allocation formula, that is, royalty was allocated to the Heimanns in proportion to the ratio that Heimanns' acreage bore to all acreage within the unit, regardless of whether actual production was from the Heimanns' tracts or from other tracts within the unit. The "surface acreage" allocation formula contained in the Bravo Dome unit plan is the

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[2] Generally, correlative rights are those rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply. *United Petroleum Exploration Inc. v. Premier Resources, Ltd.*, 511 F.Supp. 127, (W.D.Okla. 1980). Resp.App. 37a, n. 4.

most frequently employed basis for allocating unitized production. Resp.App. 38a.

Pursuant to its obligation in the Heimanns' leases, Amoco submitted the Bravo Dome unit plan for approval by appropriate governmental authorities of the State of New Mexico, including the OCC.[3]

The OCC is an administrative agency comprised of three persons experienced in the regulation of natural resource development and production. It is charged by statute with broad jurisdictional powers to supervise and regulate the production of carbon dioxide. Thus, the OCC has the authority to approve unit plans and to assure that unitization prevents waste and protects the correlative rights of all unit participants. N.M.Stat.Ann. § 70-2-11; Resp.App. 56a. To determine that a unitization plan protects correlative rights, the OCC must consider and determine the "fairness" of the unit royalty allocation

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[3] The Heimanns' statement [Pet. 3] that "Amoco filed a request for 'preliminary approval' of its proposed unit agreement with the New Mexico Oil Conservation Commission ("OCC"). (Exhibit 17)" is inaccurate and misleading. The exhibit referenced, Exhibit 17, is a submittal not to the OCC, but rather to the Commissioner of Public Lands of the State of New Mexico. Under applicable procedures for approval of unit plans, an applicant is required first to obtain preliminary approval from the Commissioner of Public Lands before seeking approval from the OCC. The Commissioner of Public Lands granted 'preliminary approval' to the unit plan (Exhibit 19), pending examination and hearing by the OCC under trial-like procedures. Upon review and approval by the OCC, discussed *infra*, the plan was returned to the Commissioner of Public Lands, who then gave final approval (Exhibit 20).

formula.[4] N.M.Stat.Ann. § 70-2-11; Resp.App. 57a. Proceedings before the OCC are conducted with trial-like procedures.[5] State law provides that any party adversely affected by an order of the OCC may petition for rehearing. And any party dissatisfied with the disposition or the rehearing may appeal to state court, where the OCC decision is reviewed for substantial evidence. N.M.Stat.Ann. § 70-2-25(A)(B); Resp.App. 51a.

After notice and hearing on July 21, 1980, the OCC found that "approval of [Amoco's] proposed unit agreement should promote the prevention of waste and the protection of correlative rights within the unit area" and,

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[4] Specifically, the OCC's statutory obligation to protect "correlative rights" in connection with approval of a unit plan means that any allocation formula must assure that *each owner* of property be afforded the opportunity, so far as is practical to do so, to produce without waste his *just and equitable share* of resources in proportion that the quantity of recoverable resource under his property bears to the total recoverable resources in the pool. N.M.Stat.Ann. § 70-2-33(H); Resp.App. 56a (emphasis added).

[5] The OCC has state statutory authority to subpoena witnesses, compel testimony under oath and require the production of documents relevant to matters within its jurisdiction. The agency's procedural rules require that hearings must be held in public, after providing notice to interested parties. All pleadings before the OCC must be served on opposing counsel and all testimony before the agency must be formally recorded. Such rules also provide that full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross examine witnesses. Written findings of fact must be entered that have sufficient support in the record. Resp.App. 50a, 51a.

consequently, approved the unit plan.[6] *Amoco Prod. Co.*, No. R-6446, unpub. order at 2 (N.M. Oil Conservation Comm'n Aug. 14, 1980) (Pet.App. B at 2).

Together with other opponents of the Bravo Dome Unit, all represented by counsel, the Heimanns successfully petitioned the OCC for rehearing. On October 9, 1980, the Heimanns, through counsel, appeared before the OCC and presented evidence that the "surface acreage" royalty allocation formula did not protect their correlative rights. Resp.App. 33a. They argued that the "surface acreage" allocation of carbon dioxide revenues did not fairly represent the quantity of recoverable carbon dioxide under their property. Resp.App. 56a. They cross-examined Amoco's witnesses and they presented their own evidence and legal argument. The OCC again approved the unit plan, concluding that, given available geological knowledge, the "surface acreage" formula was fair and adequately protected the Heimanns' correlative rights.[7] *Amoco Prod. Co.*, No. R-6556-B, unpub. order

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[6] The Heimanns wrongly imply [Pet. 3] that they did not receive notice of the OCC's July 21, 1980 hearing. Under applicable rules, they did not, and were not required to receive, a copy of Amoco's initial submittal to the New Mexico Commissioner of Public Lands (Exhibit 17). *See*, note 3, *supra*. The Heimanns indisputably received notice and participated in the actual trial-like hearings conducted by the OCC.

[7] The Heimanns repeatedly suggest that the OCC's approval of the Bravo Dome unit plan was "preliminary." Pet. 3, 9, 15. But there is nothing "preliminary" about the OCC's approval order. Pet.App. C. The OCC ordered that Amoco's unit Plan "is hereby approved," based on factual findings that

(Continued on following page)

at 3-4 (N.M. Oil Conservation Comm'n Jan. 23, 1981) (Pet.App. C at 3-4). The OCC's order contained findings of fact and conclusions of law addressed in particular to the Heimanns' correlative rights. Resp.App. 52a, 53a.

Following statutory procedure, the Heimanns and others then appealed the OCC's order to the New Mexico State District Court. They argued that the OCC's determination that the proposed unitization would protect their correlative rights was not supported by substantial evidence. The state district court affirmed the OCC. *Casados v. Oil Conservation Comm'n, No. 81-176,* unpub. order (N.M. 8th Dist. Apr. 5, 1982) (Pet.App. D). The Heimanns then appealed the state district court's order to the New Mexico Supreme Court, which also affirmed the OCC, *Casados v. Oil Conservation Comm'n, No. 14,359,* unpub. order (N.M. Nov. 10, 1983) (Pet.App. E). The New

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(Continued from previous page)

the unit plan would result in "more efficient, orderly and economic exploration of the unit; and more economical production, field gathering and treatment of carbon dioxide within the unit area". *Id.* at Order ¶ 1, Finding ¶ 8. The OCC found that such advantages would "reduce average well costs, provide for longer economic well life and result in the greater ultimate recovery of carbon dioxide gas thereby preventing waste." *Id.* at Finding ¶ 9. The OCC expressly found that unitization "was not premature." *Id.* at Finding ¶ 21. The OCC approval order did provide that the OCC retained continuing jurisdiction to supervise ongoing unit operations and Amoco has been required, since approval of the unit, "to periodically demonstrate that its operations are resulting in prevention of waste and protection of correlative rights on a continuing basis." *Id.* at Order ¶ 4-7. These conditions subsequent to unit approval, with which Amoco has complied, do not make the OCC's approval of the unit plan "preliminary."

Mexico Supreme Court held that there is "substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit will be protected." Pet.App. E at 7.

Despite approval of the unit by the OCC, and despite affirmance of that decision by two levels of judicial review, the Heimanns continued to assert that their leases were not unitized. In 1984 Amoco invoked the trial court's diversity jurisdiction, under 28 U.S.C. 1332, and sought a declaratory judgment that the Bravo Dome unit plan, having been approved by an appropriate governmental agency, had unitized the Heimanns' acreage. The Heimanns, also invoking diversity jurisdiction, counterclaimed against Amoco alleging three common-law theories of recovery: (1) unfair allocation of royalties by Amoco under the unit agreement, constituting a tortious breach of Amoco's duty of good faith; (2) undervaluation of the extracted carbon dioxide; and (3) surface damage.[8]

The trial court rejected Amoco's argument that the "fairness" finding of the OCC, as affirmed by the state's judiciary, was entitled to preclusive effect in the Heimanns' subsequent tort action for alleged breach of the duty of good faith. Resp.App. 32a. Moreover, the trial court erroneously constructed an "expansive" and "unprecedented" definition of Amoco's duty of good faith (Resp.App. 42a), which it utilized in both its instructions to the jury and its own subsequent declaratory

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[8] The jury returned a verdict for Amoco on the Heimanns' claims of under valuation and surface damage. The Heimanns claim no error on those counts.

judgment. The jury returned a verdict in favor of the Heimanns on their "unfair allocation" claim and the trial court then held that Amoco had violated its duty of good faith and declared the unitization of the Heimanns' land void.

On appeal, the Tenth Circuit reversed both the jury verdict and the trial court's declaratory judgment. It held that the trial court had misconstrued federal and state law precedent, and erroneously failed to apply state rules of issue preclusion, as required by this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Contrary to the Heimanns' statement that the OCC was acting "legislatively,"[9] the Tenth Circuit expressly found that the OCC, "was acting in a judicial capacity" when it approved the Bravo Dome unit plan. Resp.App. 53a. The Tenth Circuit held that the OCC's approval of the unit plan was entitled to preclusive effect in the Heimanns' subsequent collateral attack against the "fairness" of the unit royalty allocation formula:

> In this case, the Heimanns argue that the per-acreage allocation of the carbon dioxide revenues under the participation agreement did not fairly represent the quantity of recoverable carbon dioxide under their property. However, they made this very same argument before the OCC which concluded that, given the available geological knowledge, acreage was an appropriate criterion for the participation formula. Given the express statutory obligation of the OCC to

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[9] The Heimanns' Statement of the Case provides: " . . . under New Mexico law, [the OCC] decision was one in which it was acting 'legislatively' . . . " Pet. 6.

> protect "correlative rights," and the Commission's finding that the per-acre allocation of Bravo Dome unit revenues protected such rights, we must conclude that the fairness of the Bravo Dome unit participation plan was "actually litigated" before the OCC.

Resp.App. 56a. The Tenth Circuit reversed the judgment of the trial court and ordered entry of judgment in favor of Amoco. Resp.App. 58a.

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## REASONS WHY THE WRIT SHOULD BE DENIED

Aside from the untimeliness of the Petition, further review is not warranted because the case below was correctly decided and does not present any important issue of federal law.

### I. The Petition is untimely.

The original opinion of the Tenth Circuit was entered April 6, 1990. Resp.App. A, 1a. On April 20, 1990, the Heimanns filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in which they raised the same issues now presented in their Petition to this Court. On May 24, 1990, the Tenth Circuit amended its opinion (Resp.App. B, 30a), but in all other respects denied the petition for rehearing. Resp.App. C, 59a.

The Tenth Circuit did no more in its amended opinion than restate what it had already decided in its original opinion of April 6, 1990. (*Compare,* Appendix A [original opinion] *with* Appendix B [amended opinion]).

The amended opinion did not change matters of substance or resolve a genuine ambiguity in the original opinion. *Id.* The Heimanns concede that the Tenth Circuit's amendment to its original opinion is "not in any way material" to their Petition for Writ of Certiorari. Pet. 9.

On June 7, 1990, the Heimanns filed a second Petition for Rehearing directed only to the question of whether the Tenth Circuit's decision should be given prospective versus retroactive effect. That issue could have been, but was not, raised in the Heimanns' first Petition for Rehearing. The Heimanns' second Petition for Rehearing was denied on June 12, 1990. Resp.App. D, 61a.

The Heimanns filed this Petition for Writ of Certiorari on September 10, 1990, ninety (90) days after denial of their second Petition for Rehearing, but one hundred eight (108) days after denial of their first Petition for Rehearing. The Heimanns' Petition for Writ of Certiorari does not raise any issue concerning the prospective or retroactive application of the Tenth Circuit's decision, the basis of their second Petition for Rehearing to that court.

The Heimanns' Petition for Writ of Certiorari is untimely.

This Court has held that the time to petition for certiorari begins to run anew from a revised judgment of the court below *only* if the revision "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered," *Federal Trade Com. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952), but not "if the court did no more by the second judgment than to restate what it had decided by the first one," *Federal*

*Power Com. Idaho Power Co.*, 344 U.S. 17, 20 (1952). *Accord, FCC v. League of Women Voters*, 468 U.S. 1205 (1984).

A timely petition for rehearing ameliorates the impact of the stated rule. *United States v. Adams*, 383 U.S. 39, 41-42 (1966). But neither the applicable statute, 28 U.S.C. 1201, nor the rules of this Court or the court below authorize a second or successive petitions for rehearing, *see, e.g. National Latex Products Co. v. Sun Rubber Co.*, 276 F.2d 167 (6th Cir. 1960), particularly where, as here, the ground for rehearing urged in the second petition could have been raised in the first petition.

Accordingly, the Heimanns' Petition for Writ of Certiorari is late and should be dismissed.

## II. This diversity case was correctly decided below and does not present any important question of federal law.

This is a diversity case in which no federal cause of action was pled or tried. The court below, applying *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), "was convinced" that New Mexico courts would give preclusive effect to the OCC's decision, as affirmed by the New Mexico Supreme Court, that the Bravo Dome unit plan was fair and protected the Heimanns' correlative rights. Resp.App. 58a. Accordingly, the court below held that the Heimanns were precluded from mounting in federal court a collateral attack on the "fairness" of the unit's royalty allocation formula under the guise of a common-law tort action. Resp.App. 55a-58a.

The decision of the court below, disallowing collateral attack in federal court on the validity of unitization

orders of state resource conservation agencies is fully consistent with prior Tenth Circuit precedent, *see, e.g. Chenowerth v. Pan American Petroleum Corp.*, 314 F.2d 63, 65 (10th Cir. 1963), and follows the rule adopted without exception by all other circuits that have addressed the issue. *See, Katter v. Arkansas Louisiana Gas Co.*, 765 F.2d 730, 734 (8th Cir. 1985) (Arkansas law); *Trahan v. Superior Oil Co.*, 700 F.2d 1004, 1015-19 (5th Cir. 1983) (Louisiana law); *Mize v. Exxon Corp.*, 640 F.2d 637, 640 (5th Cir. 1981) (Alabama law). Resp.App. 53a, 54a.

The Heimanns concede the OCC had jurisdiction to decide the "fairness" of the unit allocation formula. The Heimanns also concede that the "fairness" of the royalty allocation formula was actually litigated before the OCC and they do not contest that they were provided a full and fair opportunity to litigate that issue before the OCC and the New Mexico state courts. Finally, the Heimanns do not challenge the Tenth Circuit's analysis or conclusion that the OCC's "fairness" finding, as affirmed by the New Mexico judiciary, would have been accorded preclusive effect in state courts in New Mexico.[10]

Ignoring the import of *Erie*[11], the Heimanns instead struggle to erect a two-pronged "federal" challenge to the decision below. They argue that this case merits review because the Tenth Circuit's decision contravenes first,

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[10] *See, State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 95 N.M. 560, 624 P.2d 502 (1981); *Property Tax Dept. v. Molycorp, Inc.*, 89 N.M. 603, 555 P.2d 903 (N.M. 1976); *Socorro v. Cook*, 24 N.M. 202, 173 P. 682 (1918).

[11] The Heimanns' Petition fails to even mention this Court's decision in *Erie R. Co. v. Tompkins, supra.*

"the federal common-law of issue preclusion," and second, the Heimanns' Seventh Amendment right to trial by jury. Neither argument is correct and neither merits this Court's attention.

### A. The Tenth Circuit's award of preclusive effect to the OCC's "fairness" finding, as affirmed by the New Mexico judiciary, was correctly decided under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and does not present any important question of federal law.

The Heimanns contend that the Tenth Circuit "did not recognize" that the issue preclusion question in this case presents a "federal question," to be resolved under "federal common-law rules of preclusion" as announced in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). Pet. 10-11. With such a toe hold in the federal door, the Heimanns then argue that the Tenth Circuit's decision "overlooked" the federal standard for ascertaining when an administrative agency acts in a "judicial capacity" as announced by this Court in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). Pet. 12.

There is no merit to the Heimanns' position. This diversity case, involving no federal issue, presents no opportunity for construction and application of "federal common-law rules of issue preclusion." Even if it did, the court below, applying state law standards indistinguishable from *Prentis*, correctly concluded that the OCC acted in a "judicial capacity" in approving the unit plan.

The Heimanns' attempt to construct and apply "federal common-law rules of preclusion" in this diversity case, involving no federal claims, has no basis in Supreme

Court precedent. In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court confirmed its long-held rule, first enunciated in *Erie*, that 28 U.S.C. 1738 *requires* federal courts to give preclusive effect to state-court judgments whenever the courts of the state from which the judgment emerged would do so:

> Indeed, although the federal courts may look to the common-law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, *Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgment emerges would do so.*

449 U.S. at 96 (emphasis added) (citation to 28 U.S.C. 1738 omitted). *See also, Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Nothing said in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), changes that rule. Rather, *Elliott* holds only that a decision of a state agency charged with the administration of state employment discrimination laws will be accorded preclusive effect, even if unreviewed by the judiciary, in an employee's subsequent federal cause of action under 28 U.S.C. 1983 so long as the agency acted in a "judicial capacity" and afforded the parties adequate opportunity to litigate. *Id.* at 799. Thus, *Elliott* involved the preclusive effect of an unreviewed state agency decision on a subsequent *federal cause of action*. In contrast, this case involves only a state common-law tort action – not a federal law claim for relief.[12] Moreover, in this case,

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[12] The cases cited by the Heimanns as evidencing confusion or conflict among the Circuits all involved a federal cause

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the decision of the state agency was reviewed and affirmed by the state judiciary on the basis of substantial evidence. Without eviscerating *Erie* and indeed 28 U.S.C. 1738, *Elliott* cannot be read, as the Heimanns read it, to support the proposition that federal courts are free, in common-law diversity cases, to ignore the Full Faith and Credit Clause and instead fashion "federal common-law rules of preclusion."

Even if the issue preclusion component of this case presents a "federal question," this case still does not merit Supreme Court review. The Tenth Circuit's conclusion that the OCC had acted in a "judicial capacity" was based on state common-law principles indistinguishable from the test enunciated by Justice Holmes in *Prentis*.[13]

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of action, usually racial discrimination. *See, Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 820 F.2d 892 (7th Cir. 1987) (suit pursuant to Title VII, 42 U.S.C. § 2000(e) and 28 U.S.C. 1983 for racial discrimination); *Yancy v. McDevitt*, 802 F.2d 1025 (8th Cir. 1986) (a claim of racial discrimination under 42 U.S.C. 1981 and 1983 and the 13th Amendment); *West Coast Truck Lines, Inc. v. American Industries, Inc.*, 893 F.2d 229 (9th Cir. 1990) (jurisdiction premised on the existence of a federal question pursuant to 28 U.S.C. 1331); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) (an age discrimination case premised on 29 U.S.C. § 621-634).

[13] Indeed, the Tenth Circuit, acknowledging that *Erie* rules governed this diversity case, nonetheless examined federal principles to assure consistency:

> Both *Elliott* and *Long [v. Laramie County Community College Dist.*, 840 F.2d 743 (10th Cir.), *cert. denied*, 109 S.Ct. 73 (1988)] considered whether state administrative fact findings are preclusive in a *federal* cause of

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Specifically, the court below employed the standards set forth in *Restatement (Second) Judgments*. Resp.App. 47a, 48a. The *Restatement* dictates that in order for preclusive effect to be afforded the decision of an administrative agency, the administrative proceeding must entail the "essential elements of adjudication," including: notice, fair opportunity to litigate, formulation of the issues of law and fact in terms of the application of specific rules to specific parties with respect to specific transactions and finality. *Restatement (Second) Judgments*, § 83. Resp.App. 47a, n. 9. Thus the *Restatement* common-law standard employed by the Tenth Circuit is virtually identical to the test formulated by Justice Holmes in *Prentis*.[14] The Heimanns' argument to the contrary is nothing more than semantics.

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> action. In the instant case, arising as it does under our diversity jurisdiction, under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), we must consider whether the OCC's findings are preclusive in New Mexico . . . We therefore rely on *Elliott* and *Long* only for the general preclusion principles to help determine whether the OCC's findings would be accorded collateral estoppel effect in the courts of New Mexico.

Resp.App. 49a, n. 10 (citation omitted).

[14] As Justice Holmes in *Prentis* put it:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed to exist. That is its purpose and end.

211 U.S. at 226.

And the Tenth Circuit, applying the *Restatement* standard to the facts presented, unanimously concluded that the OCC, in approving the unit plan, satisfied all elements necessary for its decision to be given preclusive effect:

> Applying *Long* and the criteria enunciated in *Restatement (Second) Judgments*, § 83, we are satisfied that the OCC's approval process is entitled to preclusive effect. As parties interested in the OCC's proceedings, the Heimanns received notice of the proposed adjudication, *see id.*, § 83(a), and, at least during the rehearing, were represented by counsel, *see Long*, 840 F.2d at 751. The OCC employed trial-like procedures in which the Heimanns enjoyed the opportunity to cross-examine Amoco's witnesses and present evidence and legal argument of their own. *See id;* Restatement (Second) Judgments, § 83(2)(b). The OCC's order approving the Bravo Dome unit formulated the issues of law and fact in terms of, their specific application to the Heimanns correlative rights, *see id.* § 83(2)(c), and New Mexico's procedures for appealing OCC orders provide a rule of finality specifying a point when presentations are terminated and decisions rendered final, *see id.* § 83(2)(d). Given this procedural framework, we are convinced that the OCC was acting in a judicial capacity when it approved the Bravo Dome Unit; its decision is therefore entitled to preclusive effect.

Resp.App. 52a, 53a.

There can thus be no question, whether examined under the *Restatement* or *Prentis*, that the OCC was acting in a "judicial capacity" when it approved the "fairness" of the unit plan. Nor can there be any serious question that in approving the unit plan, the OCC, consistent with

*Prentis*, was engaged in the declaration and enforcement of liabilities based on the present facts and under existing law. No further review by this Court is warranted.

Moreover, even if the OCC was somehow acting "legislatively," as the Heimanns suggest, the New Mexico judiciary's independent review of that act is, by itself, entitled to preclusive effect. In *Prentis*, this Court found that a Virginia state court, pursuant to Virginia law, was itself acting in a "legislative capacity" in its *de novo* examination of rate orders of a state agency. This Court held that rate-making – whether performed by an administrative agency or, in Virginia's peculiar case, a court – was clearly a "legislative" function. *Prentis*, 211 U.S. at 226. Accordingly, the Court held an injunction against the state court proceeding was not precluded by the Anti-Injunction Act. The Court deferred issuance of the injunction because "final legislative action" had not yet been taken by the Virginia court. *Id.* at 230.

The Heimanns cite *Prentis* for the proposition that judicial affirmance of a decision of administrative agency acting in a "legislative" capacity is itself a legislative act, thereby preventing application of preclusive effect to the decisions of both the agency and the reviewing court. Pet. at 18. The Heimanns overreach, as this Court confirms in *New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)*, ___ U.S. ___, 105 L.Ed. 2d 298, 109 S.Ct. 2506 (1989).

In *NOPSI*, a New Orleans utility had secured cost-allocation relief from FERC. However, the City Council rate-making body refused a pass-through of such costs in contravention of *Nantahala Power & Light Co. v. Thornburg*,

476 U.S. 953 (1986). The utility sought judicial review of the Council's order in state court and simultaneously sought federal injunction relief on grounds that *Nantahala* pre-empted the issue. The federal district court abstained from deciding the suit and the Fifth Circuit affirmed. The Supreme Court reversed, holding the abstention doctrine inapplicable to the facts presented. The City Council had relied in part on *Prentis*, arguing that abstention was proper because a state court was then reviewing a "legislative act" of an administrative agency. In rejecting this contention, this Court recognized that the critical distinction in *Prentis* was that the state court there was acting as a "legislative" body, itself empowered to set rates:

> There is no contention here that the Louisiana courts' review involves anything other than a judicial act . . . Since the state court review is not an extension of the legislative process, NOPSI's pre-emption claim was ripe for federal review when the Council's order was entered.

109 S.Ct. at 2520.

Hence, *NOPSI* confirms, contrary to the Heimanns' suggestion, that judicial review of legislative action by an administrative agency is not necessarily itself a legislative act. Stated differently, judicial review of the legislative findings of an agency may be just that – judicial review. As *Prentis* states: "[t]he question depends not upon the character of the body, but on the character of the proceedings." 211 U.S. at 226.

When *Prentis* is read in light of *NOPSI*, the Heimanns' collateral estoppel argument surely must fail. *NOPSI* teaches that when a court reviews an agency decision, even a legislative one, courts generally act in a

judicial, not a legislative capacity. Clearly that is the case here. When the New Mexico District and Supreme Court affirmed the OCC order, they had no authority, as the Virginia court in *Prentis* did, to change or modify the OCC's decision upon the consideration of new or different evidence. Rather, the New Mexico courts could only act judicially, as courts, to determine whether the OCC's decision was supported by substantial evidence and conformed to statutory mandate. *See, Rutter & Wilbanks Corp. v. Oil Conservation Com.*, 87 N.M. 286, 582, 583 (N.M. 1975).

Accordingly, the independent judicial review and affirmance of the OCC's "fairness" order by New Mexico courts is entitled to preclusive effect, even if the OCC was acting, as the Heimanns contend, in a "legislative" capacity.

### B. The decision of the Tenth Circuit does not contravene the Heimanns' Seventh Amendment right to jury trial.

Citing this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ___, 106 L.Ed. 2d 26, 109 S.Ct. 2782 (1989), the Heimanns contend that the Tenth Circuit has deprived them of their right to trial by jury. They assert it is "beyond peradventure" that their claims involve "only private rights" [Pet. 21] and that "without question" they were entitled to a jury trial on Amoco's alleged breach of its common-law duty of good faith. Pet. 22, n. 5.

The Heimanns' argument misconstrues this Court's holding in *Granfinanciera* and fails to recognize the constitutionality under the Seventh Amendment of non-jury

proceedings in which private rights are decided as part of the greater process of adjudicating public rights.

In *Granfinanciera* the question was whether a party who had *not* submitted a debt claim in bankruptcy court and who had *not* otherwise voluntarily appeared in bankruptcy proceedings, was entitled to a jury trial when sued by the bankruptcy trustee to recover an alleged preferential transfer. The Court held that the Seventh Amendment applied and a jury trial was required.

*Granfinanciera* does not suggest, however, that a party who voluntarily appears and litigates an issue before a jurisdictionally proper forum without a jury is entitled, upon losing, to relitigate the same issue before a jury in another forum – which are the facts at issue here. If there is an analogous case in the bankruptcy context, it is not *Granfinanciera*, but rather this Court's decision in *Katchen v. Landy*, 382 U.S. 323 (1966). In *Katchen*, the Court expressly held that a party who *had* appeared and filed claims in a bankruptcy court was not entitled to a jury trial when countersued by the trustee to void an alleged preference. Under the *Katchen* rationale, the Heimanns, who voluntarily litigated the "fairness" of the unit's royalty allocation formula before the OCC, "subjected themselves to all the consequences that attach to an appearance," including the constitutionality of the first tribunal to decide jurisdictionally proper issues, in summary fashion, without a jury. *Granfinanciera*, 106 L.Ed. 2d at 52, n. 14, quoting *Alexander v. Hillman*, 296 U.S. 222, 241-242 (1935).[15]

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[15] *See also, Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 849 (1986), which holds that a party's voluntary

(Continued on following page)

More fundamental than the Heimanns' effective waiver of any right to a jury trial, however, is the fact that: "[T]he Seventh Amendment was never intended to establish the jury as the exclusive mechanism for fact finding in civil cases." *Atlas Roofing Co. v. Occupational Safety and Health Review Com.*, 430 U.S. 442 (1977). In *Atlas*, this Court held that when public rights are being litigated, the Seventh Amendment does not prohibit the assignment of the fact-finding function to a non-jury panel. This Court stated that:

> . . . when Congress creates new statutory "public rights" it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common-law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.

*Id.* at 455. Thus, it cannot be said that an administrative agency violates an individual's rights to trial by jury when it makes findings in a public rights adjudication which also determine the individual's "private rights." As this Court stated in *Thomas v. Union Carbide Agricultural Products*, 437 U.S. 586, 589 (1985), summarizing the permissible effect of administrative findings in public

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(Continued from previous page)

participation in federal administrative proceedings constitutes a waiver of that party's right to trial of state-law counterclaims by an Article III court.

rights litigation on related private rights: "These proceedings surely determine liabilities of individuals."[16]

Examined in the context of such precedent, the fundamental question is not whether the Heimanns' common-law lease claim against Amoco involves "purely private rights," but whether the OCC, when it found that the royalty allocation formula in Amoco's unit plan fairly protected correlative rights, was adjudicating public rights. The answer to that question is yes, and accordingly the OCC's decision, even though it necessarily may have affected private rights, does not violate the Seventh Amendment.[17]

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[16] *See also Block v. Hirsch*, 256 U.S. 135, 158 (1921), and *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937).

[17] This distinction was recognized by the Court in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), in language particularly compelling in this case:

> It would disregard the parties' agreement to conclude . . . that because the court suit was one for breach of contract which the administrative agency had no authority to decide, the court need not accept administrative findings which were appropriately made and obviously relevant to another claim within the jurisdiction of the board.
>
> . . .
>
> Any claim, whether within or without the disputes clause, can be couched in breach of contract language. The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics.

*Id.* at 419.

New Mexico has created a comprehensive regulatory scheme, administered by the OCC, to control the development and production of natural resources, including carbon dioxide, within its borders. N.M. Stat. Ann. § 70-2-34. Within this scheme, New Mexico law establishes that the "right" of any individual to gas production from his lands is "not absolute or unconditional" but is instead assertable "only insofar as it is practicable to do so without waste." *Continental Oil Co. v. Oil Conservation Com.*, 70 N.M. 310, 373 P.2d 809, 818 (1962). New Mexico law also establishes that the OCC, when it acts to prevent waste and protect correlative rights, is in essence adjudicating public rights. *El Paso Natural Gas Co. v. Oil Conservation Com.*, 76 N.M. 268, 414 P.2d 496 (1966).[18] Finally, in *Grace v. Oil Conservation Com.*, 87 N.M. 205, 531 P.2d 939 (1975), the New Mexico Supreme Court confirmed that these public rights in the prevention of waste of the resource predominate over individual private rights:

> *Prevention of waste is paramount, and private rights,* such as prevention of drainage not offset by counterdrainage and correlative rights *must stand aside* until it is practical to determine the amount of gas underlying each producer's tract or in the pool.

531 P.2d at 946.

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[18] The New Mexico Supreme Court noted: "Recognizing the need and *right of the state, in the interest of the public welfare* to prevent waste of an irreplaceable natural resource, the legislature enacted those laws authorizing the Commission to exercise control over oil and gas wells by limiting the total production in the pool, and making it the duty of the Commission to protect the correlative rights of all producers so far as it can be accomplished without waste to the pool." 414 P.2d at 497, 498.

Under New Mexico law, the OCC – an agency with technical expertise, charged by state statute to prevent waste and protect correlative rights – is indisputably an administrative forum in which "public rights are being litigated." *Atlas Roofing Co. v. Occupational Safety & Health Review Com.*, 430 U.S. 442, 450 (1977). Under *Atlas Roofing*, and its progeny, the OCC can thus perform its statutory fact-finding functions without contravening the Seventh Amendment. As a result, there is simply no merit to the Heimanns' Seventh Amendment claim.

## CONCLUSION

This case bears none of the hallmarks of a case justifying Supreme Court review and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX

**APPENDIX A**

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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AMOCO PRODUCTION COMPANY,

Plaintiff-Counterdefendant-Appellant and Cross-Appellee,

vs.

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE; HOWARD W. ROBERTSON; PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE and DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for RANDALL LYNNE HEIMANN, JAY DEE HEIMANN, GENE ALVIN HEIMANN and RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; and JOHNANN ADEE, in her capacity as Personal Representative of the Estate of Fred P. Heimann, deceased,

Defendants-Counterclaimants-Appellees and Cross-Appellants.

Nos. 88-2070, 88-2072 88-2255, 88-2355

(Filed April 6, 1990)

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CV-84-1430)

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William F. Carr (Michael B. Campbell & John H. Bemis, with him on the brief), Campbell & Black, Santa Fe, New Mexico, for Plaintiff-Counterdefendant-Appellant and Cross-Appellee.

Steven L. Tucker (Jerry Wertheim & Arturo L. Jaramillo, with him on the brief), Jones, Snead, Wertheim, Rodriguez & Wentworth, Santa Fe, New Mexico, for Defendants-Counterclaimants-Appellees and Cross-Appellants.

Charles L. Kaiser and Mary A. Viviano, Davis, Graham & Stubbs, Denver, Colorado, filed an amicus curiae brief for the Rocky Mountain Oil and Gas Association.

Paul A. Cooter, Rodey, Dickason, Sloan, Akin & Robb, Santa Fe, New Mexico, filed an amicus curiae brief for the New Mexico Oil and Gas Association.

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Before SEYMOUR and BALDOCK, Circuit Judges, and THEIS, District Judge.*

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BALDOCK, Circuit Judge.

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* The Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

Amoco Production Company (Amoco) appeals from a $4 million judgment arising out of its unitization of a carbon dioxide field in northeastern New Mexico. Amoco argues, *inter alia*, that the district court 1) misinstructed the jury on an oil or gas lessee's duty of good faith, and 2) improperly failed to accord collateral estoppel effect to the findings of the New Mexico Oil Conservation Commission (OCC). Our jurisdiction over this diversity case arises under 28 U.S.C. § 1291. We hold that 1) a good faith inquiry into an oil and gas lessee's conduct is unnecessary where the unitization previously was approved by an independent state agency which passes on the fairness of the participation formula, such as the OCC, and 2) the OCC's approval of the unitization plan in this case has collateral estoppel effect upon the appellees' challenge to the unit's allocation formula. Accordingly, we reverse.

## I.

Defendants-Counterclaimants-Appellees (the Heimanns) are a family of ranchers who have lived in northeastern New Mexico since the early part of this century. The Heimanns own 48,120 acres of ranch land in Union, Quay and Harding Counties, New Mexico. Between 1971 and 1974, the Heimanns executed three carbon dioxide ($CO_2$) and mineral leases with Amoco. Each of these three leases contained a unitization clause which granted Amoco the right to unitize the Heimanns' mineral interests with other lands in the area, subject to approval "by any governmental authority." The leases granted the Heimanns a one-eighth royalty of the net proceeds received from all oil, gas or $CO_2$ produced on their lands.

In the late 1970's, Amoco embarked upon a plan to pipe $CO_2$ from northern New Mexico to its west Texas oil fields in order to enhance recovery there. Amoco therefore sought to unitize the mineral rights to approximately 1,174,225 acres of land in Harding, Union and Quay Counties, including the Heimanns's land.[1] The proposed agreement for the "Bravo Dome" unit allocated royalties on the basis of "surface acreage;" production was allocated according to the total surface areas contained in each tract. Amoco sought approval of the Bravo Dome unit from the OCC. The Commission found that "approval of the proposed unit agreement should promote the preventions of waste and the protection of correlative rights within the unit area" and consequently approved the unit agreement. *Amoco Prod. Co.*, No. R-6446, unpub. order at 1 (N.M. Oil. Conservation Comm'n Aug. 14, 1980).

Together with other opponents of the Bravo Dome unit, all represented by counsel, the Heimanns successfully petitioned the OCC for rehearing. On October 9, 1980, the Heimanns and other opponents of the unit appeared before the OCC and presented evidence that the per-acre participation formula did not protect their correlative rights. The OCC found in pertinent part:

> (14) That the evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the

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[1] Amoco held a 74% working interest in the unitized lands.

distribution of production or proceeds therefrom from the unit; these methods are as follows:

(a) a formula which provides that each owner in the unit shall share in the production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and

(b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

* * *

> (25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste and which is fair to the owners of interests therein.
>
> . . . .

*Amoco Prod. Co.*, No. R-6446-B, unpub. order at 3-4 (N.M. Oil, Conservation Comm'n Jan. 23, 1981).

The Heimanns appealed the OCC's order on rehearing to the New Mexico state district court for Taos County. They argued that there was not substantial evidence supporting the OCC's determination that the proposed unitization would protect their correlative rights. The district court, however, affirmed the Commission. *Casados v. Oil Conservation Comm'n*, No. 81-176, unpub. order at 4 (N.M. 8th Dist. Apr. 5, 1982). The Heimanns appealed the district court's order to the New Mexico Supreme Court which affirmed. *Casados v. Oil Conservation Comm'n*, No. 14,359, unpub. order at 8 (N.M. Nov. 10, 1983). The Supreme Court held that the record contained "substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit area will be protected." *Id.*

In 1984, Amoco filed suit against the Heimanns in federal district court seeking a declaratory judgment under 28 U.S.C. § 2201(a) that Amoco had properly unitized the interests covered under the leases. The Heimanns counterclaimed alleging three theories of recovery: 1) unfair allocation of royalties under the unitization agreement; 2) undervaluation of the extracted $CO_2$; and 3) surface damage. At the conclusion of the

trial, the court instructed the jury on the components of Amoco's good faith duty which it was obliged to follow in exercising its powers under the unitization clause:

INSTRUCTION NO. 18

> Amoco's duty of good faith is not fulfilled merely by refraining from dishonest conduct. Rather, Amoco has certain affirmative duties which it must fulfill as a prerequisite to a finding of good faith. These are:
>
> (a) Disclosure to the Heimanns of the material facts affecting their interest in the proposed unitization, including the geological and geophysical characteristics of their lands compared with that of other lands within the proposed unit area, and the significance of that data as it affects the Heimanns' interest;
>
> (b) Cooperation with the Heimanns in planning the unitization program. Such cooperation may consist of communicating to the extent possible with the Heimanns in an effort to impart pertinent knowledge to the Heimanns; and
>
> (c) Disclosure to the Heimanns of any interests of Amoco in unitization which were adverse to the interest of the Heimanns.

The jury returned a special verdict in favor of Amoco on the fair market value and surface damage claims, but found for the Heimanns on the royalty allocation charge. The jury awarded the Heimanns damages in the amount of $3,500,000 compensatory damages and $500,000 punitive damages. The district court then held that Amoco had violated its duty of good faith and declared the unitization of the Heimanns lands void.

II.

Unitization refers to the consolidation of mineral or leasehold interests in oil or gas covering a common source of supply.[2] 1 B. Kramer & P. Martin, *The Law of Pooling and Unitization* § 1.02 at 1-3 (3d ed. 1989); *see Parkin v. Corporation Comm'n of Kansas*, 677 P.2d 991, 1002 (Kan. 1984). Unitization resulted from state legislatures' efforts to modify the rule of capture which had previously been applied to oil and gas law. *See Clark Oil Prod. Co. v. Hodel*, 667 F. Supp. 281, 290 (D.N.D. 1982); Kramer & Martin, *supra* p. 7, § 3.02. The goals of unitization are conserving resources by preventing waste and protecting landowners' correlative rights.[3] *See, e.g.*, N.M. Stat. Ann. § 70-2-11 (1987 Rep. Pamp.). Following unitization of an oil field, the royalty clause of a oil and gas lease generally is modified and the lessor becomes entitled to a royalty based on a pro rata share of the production attributable to its land, regardless of whether production is from that land or another tract included within the unit. Williams & Meyers, *supra* n. 2, § 951 at 694.12. The working interest

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[2] While frequently used interchangeably, the terms "pooling" and "unitization" refer to separate procedures. Pooling involves the combination of several small tracts of land to meet the spacing requirements for a single well. Unitization refers to field-wide or partial field-wide operation of a producing reservoir involving multiple adjoining land tracts. 6 H. Williams & C. Meyers, *Oil and Gas Law* § 901 at 2 (1989); R. Hemingway, *Law of Oil and Gas* § 7.13 (1983).

[3] "Correlative rights" are "rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply." *United Petroleum Exploration v. Premier Resources*, 511 F. Supp. 127, 129 (W.D. Okla. 1980).

owners' share is based on a participation formula calculated from geological, physical and economic data. Kramer & Martin, *supra* p. 7, § 17.02[5]. No single method of calculating the participation formula is appropriate for all situations, Williams & Meyers, *supra* n. 2, § 970 at 816.5, and although the most frequently employed basis for allocating unitized production is surface acreage, *id.* § 970.1 at 816.6, arriving at a perfect participation agreement is impossible. Kramer & Martin, *supra* p. 7, § 17.02[5][a] at 17-16. As this court has explained:

> The percentage of an estimated pool recovery under a unitized operation assigned to a particular lease represents at best only an estimated contribution from that tract under a single unitized operation. Without more, it cannot be taken as evidence of the estimated recovery therefrom under an independent, individual operation of the lease.

*Stanolind Oil & Gas Co. v. Sellers*, 174 F.2d 948, 956 (10th Cir.), *cert. denied*, 338 U.S. 867 (1949).

Two methods exist whereby separately-owned tracts can be combined in a single unit: voluntary unitization by contract or forced unitization by regulatory authority. *See* Douglass, *Powers and Problems of Lessee Pooling*, 34 Sw. legal Fed'n Oil & Gas Inst. 231 (1983). Because the Bravo Dome unit resulted from Amoco's voluntary petition to the OCC, we concern ourselves here with voluntary unitization.

The unitization clause of an oil and gas lease grants the lessee the power to unitize the lessors interest without further consent by the lessor.[4] Kramer & Martin, *supra*

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[4] Such clauses can be said to effectuate voluntary pooling or unitization in that the pooling or unitization is not

(Continued on following page)

p. 7, § 8.01 at 8-1; Hemingway, *supra* n. 2, § 7.13. Without such a clause, the lessee has no authority to pool or unitize the interests of the lessor. Kramer & Martin, *supra* p. 7, § 8.01 at 8-2. *See also Celsius Energy Co. v. Mid Am. Petroleum*, 894 F.2d 1238, 1240 (10th Cir. 1990) (language of lease determines extent of lessee's pooling authority). Because neither the lessor nor the lessee usually know the relevant facts concerning the need for unitization at the time the lease is signed, unitization clauses must be framed in general terms. *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 933 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955); Kramer & Martin, *supra* p. 7, § 8.01 at 8-2; Hemingway, *supra* n. 2, § 7.13 (unitization clauses in oil and gas leases are to be interpreted liberally). *But see Leonard v. Barnes*, 404 P.2d 292, 301 (N.M. 1965) (where an oil and gas lease contains no express provision to unitize, courts will not strain to interpret contract to provide for unitization or pooling).

In addition to contractual limitations on the exercise of the lessee's unitization power, an oil and gas lessee owes the lessor the additional duty of fair dealing, often stated in terms of good faith. Kramer & Martin, *supra* p. 7, § 8.06 at 8-32; Hemingway, *supra* n. 2, § 7.13. In *Boone v. Kerr-McGee Oil Indus.*, 217 F.2d 63 (10th Cir. 1954), this court explained that the good faith duty is necessary

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compelled by state authority. On the other hand, because such clauses inevitably vest the lessee with the unilateral power to pool or unitize, the pooling or unitization implemented under such clauses is not voluntary for the lessor. *See* Kramer & Martin, *supra* p. 7, § 8.02 at 8-2.

because of the unilateral power vested in the lessee by a unitization clause:

> Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for the exercise of such power. All the authorities are to this effect.
>
> In approaching a consideration of this question, we keep in mind a further principle and that is that the law presumes that men will act honestly and fairly in dealing with each other. In other words, the law presumes honest and fair dealing, and bad faith or fraud is never presumed and must be established affirmatively.

*Id.* at 65 (footnote omitted). In *Peterson*, we further explained the good faith duty of oil and gas lessees in effectuating voluntary unitization agreements:

> A lessee is bound by implied covenants in the lease to diligently explore and develop the lease, and to do so under a fair unitization plan, if unitization is effected; to market the production if the oil and gas is found in paying quantities; to do that which an operator of ordinary prudence, having due regard for the interests of both the lessor and the lessee, would do; and, in case of unitization to act fairly and in good faith, with due regard for the lessors' interest, and to provide for a fair apportionment of the oil produced.

218 F.2d at 934 (footnote omitted). Because the unitization plan at issue in *Peterson* increased efficiency of oil production, we held the lessee's unitization to be in good faith. *Id.*

A lessee's good faith is often called into question when the pooling or unitization power is exercised close to the end of the primary term, Kramer & Martin, *supra* p. 7, § 8.06[2]; *see, e.g., Amoco Prod. Co. v. Underwood*, 558 S.W.2d 509, 512-13 (Tex. Civ. App. 1977) (where unit established solely to retain leases that would otherwise expire, lessee acted in bad faith); *but see Boone*, 217 F.2d at 65-66 (mere fact that only a few months remained in lease at time of unitization did not constitute bad faith), when the lessee includes nonproductive land in the unit, Kramer & Martin, *supra* p. 7, § 8.06[2]; *see, e.g., Southwest Gas Prod. Co. v. Seale*, 191 So.2d 115, 121 (Miss. 1966), or when the lessee's economic interests are antagonistic to those of the lessor, Kramer & Martin, *supra* p. 7, § 8.06[2]. However, when and how to drill usually remains the prerogative of the driller; a mere exercise of that power contrary to the desires of the lessors or the weight of geological opinion does not, in itself, show a lack of good faith. *Diggs v. Cities Serv. Oil Co.*, 241 F.2d 425, 427 & n.2 (10th Cir. 1957). Moreover, although the lessee's duty of good faith requires that it take the lessor's interest into account in exercising its powers under the unitization clause, the lessee need not subordinate its interest entirely to those of the lessor. *See Elliott v. Davis*, 553 S.W.2d 223, 226-27 (Tex. Civ. App. 1977). Thus, although the lessee's good faith duty has at times been referred to as fiduciary, such standard is altogether too strict. *See Amoco Prod. Co. v. Jacobs*, 746 F.2d 1394, 1398-99 (10th Cir. 1984); *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 206 (Tex. App. 1986).

A.

The district court understandably relied upon this court's opinion in *Jacobs* for the proposition that, in order to satisfy the duty of good faith, a lessee must: 1) disclose geological facts affecting the lessor's interest in the unitization; 2) cooperate with the lessor in planning the unitization; and 3) disclose any interest in the unitization adverse to the lessor. While *Jacobs* contains language that can be read to support this view, 746 F.2d at 1401, we cannot determine from the text of the opinion whether the court actually intended to create such an expansive definition of good faith.[5] After consulting *Boone, Peterson* and other cases and authorities on unitization, however, we conclude for the reasons stated below that *Jacobs* did not intend to create such an unprecedented rule of good faith.

Although inclusion of geologically inferior land in the Bravo Dome unit by lessee Amoco could violate its duty of good faith, no authority imposes a duty upon lessees to produce and disclose geologic facts to a lessor

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[5] We are not alone in our inability to decipher *Jacob's* holding; several scholarly works have expressed similar difficulty. *See, e.g.*, Kramer & Martin, *supra* p. 7, § 17.01 at 17-3 n.4 (criticizing *Jacobs*); E. Kuntz, J. Lowe, O. Anderson & E. Smith, *Cases and Materials on Oil and Gas Law*, 744 (1986) (suggesting students read *Jacobs* "[f]or a case illustrating the difficulty courts have in dealing with this question [of good faith]"). Moreover, it is apparent that the district court shared our confusion over *Jacobs* when it informed counsel: "[B]eing very frank with you, both you gentlemen on both sides are apparently . . . as confused on what [*Jacobs*] said as I am." Rec. vol. IV at 350.

comparing the lessor's mineral interest to those in the rest of the unit. Under New Mexico law, an oil or gas lease must be given the legal affect resulting from the language within the four corners of the instrument, absent ambiguity. *See Owens v. Superior Oil Co.*, 730 P.2d 458, 459 (N.M. 1986). Because the Heimanns assented to a lease which unequivocally granted Amoco the power to unitize, subject to approval by governmental authority, we decline to stray beyond the four corners of the lease to impose upon Amoco a duty to cooperate with the lessor in planning its unitization. If Amoco operated the Bravo Dome unit in a manner adverse to the Heimanns' interest, such conduct might constitute bad faith. However, no authority imposes an affirmative duty upon a lessee to disclose every interest in a unitization adverse to the lessor and we decline to create one here.

While we understand how the district court, relying upon the equivocal language in *Jacobs*, reasonably could conclude that its Instruction No. 18 correctly stated the lessee's duty of good faith, we conclude that the court's instruction was too broad. Because we hold that the OCC's approval of the Bravo Dome unit renders the good faith inquiry unnecessary in this case, we do not address whether the erroneous instruction prejudiced Amoco.

B.

A good faith duty is imposed where unbridled discretion is vested in an oil or gas lessee by a unitization clause. *See Boone*, 217 F.2d at 65. If a lessee had complete discretion in unitizing an oil or gas field, the lessee

might, in bad faith, combine lessor's land with less productive land, calculate a production formula which underrepresents the lessor's mineral interest, or unitize solely to avoid the termination of a lease. But where a neutral and detached agency approves a proposed unitization after undertaking an extensive and independent study of geological, physical and economic data, the agency normally will constrain such abuses by a lessee. *See Celsius Energy*, 894 F.2d at 1240 (good faith requirement imposed to limit lessee's broad authority under pooling clauses).

A good faith duty also may serve to assure the fair allocation of oil and gas produced by the unit. *See Phillips*, 218 F.2d at 934. Where the lessee maintains complete discretion in formulating a unitization plan, the lessee might abuse that discretion and select a participation formula which underrepresents the contribution to the unit from the lessor's land. However, where an agency such as the OCC passes upon the fairness of a proposed participation formula, concerns of lessee unfairness are ameliorated. For unless a proposed unitization plan provides for a fair participation formula, it will not win OCC approval. *See* N.M. Stat. Ann. §§ 70-2-11, 70-2-33(H). Under New Mexico law:

> If the division determines that the participation formula contained in the unitization agreement *does not allocate unitized hydrocarbons*[6] *on a fair,*

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[6] Although its name might suggest otherwise, the New Mexico Oil Conservation Commission and its parent, the Oil Conservation Division, maintain jurisdiction over carbon dioxide resources as well as hydrocarbons. N.M. Stat. Ann.

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> *reasonable and equitable basis,* the division shall determine the relative value, from evidence introduced at the hearing, taking into account the separately owned tracts in the unit area, exclusive of physical equipment, for development of oil and gas by unit operations, and *the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area.*

N.M. Stat. Ann. 70-7-6 (B) (emphasis supplied).

Evaluating the statutory framework behind the OCC, we are convinced that it ameliorates the danger of lessee unfairness which gave rise to the good faith duty. Where approval of a unitization plan is finally determined by the OCC, the dangers resulting from the lessee's complete discretion which concerned this court in *Boone* are absent. *See also Celsius Energy,* slip op. at 6. And where the OCC approves the participation formula after a careful and independent inquiry into the relevant geophysical and economic criteria, a fair allocation of proceeds is determined without resort to the lessee's good faith duty. Therefore, because the components of a lessee's good faith duty are necessarily encompassed within the OCC's approval criteria, it is a waste of judicial resources to conduct a second good faith inquiry here.[7]

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§ 70-2-34. Under New Mexico law, the same provisions which relate to natural gas apply to $CO_2$, insofar as they are applicible. *Id.*

[7] We note that the Amoco-Heimann lease did not require approval by the New Mexico Oil Conservation Commission,

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We recognize that our analysis may conflict with language in *Jacobs* suggesting that the OCC cannot, by its "blessing" of a unitization plan, rule on the question of good faith. 746 F.2d at 1403-04. However, with all due respect, we believe the Court in *Jacobs* overlooked explicit statutory language empowering the OCC to rule on the fairness of a proposed unitization plan, *see* N.M. Stat. Ann. §§ 70-2-33(H), 70-7-6 (B), and ignored the proper deference owed by federal courts to the findings of state administrative agencies, *see* discussion *infra* at 17-20. Given the elaborate procedures required for obtaining OCC approval of a proposed unitization, as well as the technical expertise possessed by its members, it is inaccurate to describe the Commission's approval process as a mere "blessing." *See* N.M. Stat. Ann. §§ 70-2-4 through 70-2-10. Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of a unitization plan and entitled to full faith credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said

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but rather, "by any governmental authority." In holding that the OCC's approval of the Bravo Dome unit is conclusive on the issue of good faith, we therefore limit our holding to the OCC and recognize that a different result may prevail under a different statutory scheme. *See, e.g., Samson Resources Co. v. Corporation Comm'n*, 702 P.2d 19, 23 (Okla. 1985) (private action alleging good faith violation by unit operator was not precluded by Oklahoma Corporation Commission's previous approval of unit because action did not implicate correlative rights, as defined under Oklahoma law).

approval is conclusive on the issue of good faith. To the extent that *Jacobs* holds to the contrary, it is overruled.[8]

III.

Having concluded that a good faith inquiry is unnecessary where the fairness of a unitization plan already has been adjudged by a regulatory agency entitled to full faith and credit by a federal court, we must determine whether the OCC is entitled to such credit.

A.

Where a state agency acts in a judicial capacity, resolves facts properly before it and the parties have had an adequate opportunity to litigate, we accord the agency's decision the same preclusive effect to which it would be entitled in the state's courts. *University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986). New Mexico has granted preclusive effect to the findings of administrative agencies acting within their proper capacity. *See State v. Rio Rancho Estates, Inc.*, 624 P.2d 502, 504 (N.M. 1981); *Property Tax Dept. v. Molycorp, Inc.*, 555 P.2d 903, 905 (N.M. 1976); *City of Socorro v. Cook*, 173 P. 682, 684-85 (N.M. 1918). However, New Mexico courts have never considered the preclusive effect of an OCC decision. Applying the standard enunciated by the New Mexico

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[8] Because this panel opinion overrules Tenth Circuit precedent, it has been circulated among all active judges of this court. All judges agree with the panel's holding that, because Amoco's good faith was necessarily encompassed within the OCC's consideration of the Bravo Dome unit, the Commission's approval of said unitization is conclusive on the question of Amoco's good faith.

courts, we therefore consult general principles of preclusion to anticipate the effect of the OCC approval of the Bravo Dome unit.

When an agency's function resembles that of a trial court, the agency adjudication is entitled to preclusive effect. 4 K. Davis, *Administrative Law Treatise* § 21:3 at 51-52 (1983). Conversely, where the agency's action is merely ministerial, *res judicata* and collateral estoppel do not attach. *Id.* In determining whether the administrative agency was "acting in a judicial capacity," *Elliott*, 478 U.S. at 799, no single model of procedural fairness is dictated by the due process clause, *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 483 (1981). Rather, we must look to our prior cases as well as the *Restatement (Second) Judgments* § 83[9] to

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[9] The Restatement provides in pertinent part:

§ 83. Adjudicative Determination by Administrative Tribunal.

. . .

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication . . .

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

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determine whether the OCC acts in a judicial capacity when it approves a proposed unitization plan.

In *Long v. Laramie County Community College Dist.*, 840 F.2d 743 (10th Cir.), *cert. denied*, 109 S.Ct. 73 (1988), we held that a state college grievance committee's finding that an employee had been harassed sexually was preclusive in a subsequent action brought under 42 U.S.C. §§ 1983, 1985. Because most of the parties before the grievance committee had been represented by counsel, witnesses were cross-examined, documentary evidence

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(c) A formulation of issues of law and fact in terms of the application of rules with respect to specific parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

. . . .

*Restatement (Second) Judgments* § 83 at 266-67 (1982).

Although this section specifically refers to "res judicata," or claim preclusion, it also applies to collateral estoppel, issue preclusion. *Id. comment b* at 270-71.

was introduced in accordance with Wyoming APA and the committee rendered findings and recommendations which were reviewed by College's Board of Trustees, we concluded that the commission was acting in a judicial capacity under *Elliott*.[10] *Id.* at 751. In *Katter v. Arkansas La. Gas*, 765 F.2d 730 (8th Cir. 1985), the Eighth Circuit similarly held that an integration order by the Arkansas Oil and Gas Commission was entitled to full faith and credit in a subsequent action brought in federal court:

> Clearly the Arkansas legislature intended an adjudicatory, *in rem* order [by the Oil and Gas Commission] which, when final, would have all the force and effect of a court judgment; and in fact required and provided for all the things necessary to give it that effect. (citation omitted). In general, then, such an order would fix the parties' rights and duties as fully and finally as a court judgment – albeit here a default judgment – and would be entitled to the same full faith and credit and preclusive effect.

*Id.* at 734.

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[10] Both *Elliott* and *Long* considered whether state administrative fact findings are preclusive in a *federal* cause of action. In the instant case, arising as it does under our diversity jurisdiction, under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), we must consider whether the OCC's findings are preclusive in New Mexico courts. *See Braselton v. Clearfield State Bank*, 606 F.2d 285, 287 & n. 1 (10th Cir. 1979). We therefore rely upon *Elliott* and *Long* only for general preclusion principles to help determine whether the OCC's findings would be accorded collateral estoppel effect in the courts of New Mexico.

B.

The New Mexico Oil Conservation Commission consists of three persons: a designee of the Commissioner of Public Lands, a designee of the Secretary of Energy, Minerals and Natural Resources and the Director of the Oil Conservation Division. N.M. Stat. Ann. § 70-2-4. The two designated members must be "persons who have expertise in the regulation of petroleum production by virtue of education or training," *id.*, while the third member must either be a registered petroleum engineer or else, by virtue of education and experience, have experience in petroleum engineering. N.M. Stat. Ann. § 70-2-5(B). The OCC has authority to subpoena witnesses, compel testimony and require production of books, papers and records relative to matters within the commission's jurisdiction. N.M. Stat. Ann. § 70-2-8. OCC members may administer oaths to any witness in any proceeding; a person who testifies falsely under oath before the commission is guilty of perjury. N.M. Stat. Ann. § 70-2-10 Hearings of the OCC are held in public, N.M. Oil Conservation Div. R. 1201 (1989), after providing interested parties with notice, N.M. Oil Conservation Div. R. 1204-07, and may be initiated upon the motion of any operator, producer or person having a pertinent property interest. N.M. Oil Conservation Div. R. 1203. All pleadings before the OCC must be mailed to adverse parties, N.M. Oil Conservation Div. R. 1208, and all testimony delivered before the Commission must be formally recorded, N.M. Oil conservation Div. R. 1210. Any person testifying under subpoena or in support of or in opposition to a motion before the Commission must do so under oath. *Id.* The OCC's procedural rules further provide:

> Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served. No order shall be made which is not supported by competent legal evidence.

N.M. Oil Conservation Div. R. 1212. In reaching a decision, the OCC must make written findings of fact that have sufficient support in the record. *Fasken v. Oil Conservation Comm'n*, 532 P.2d 588, 590 (N.M. 1975). Any party adversely affected by an order of the Commission may petition for rehearing, N.M. Stat. Ann. § 70-2-25(A); any party dissatisfied with the disposition of the rehearing may appeal to the state district court, N.M. Stat. Ann. § 70-2-25(B), where the OCC's utilization decision is reviewed for substantial evidence, *Viking Petroleum v. Oil Conservation Comm'n*, 672 P.2d 280, 282 (N.M. 1983). Although New Mexico courts will accord "[s]pecial weight . . . to the experience, technical competence and specialized knowledge of the Commission[,]" *id.*, the OCC's findings must be based on ultimate facts involving "foundationary matters," and "basic conclusions of fact[.]" *Continental Oil v. Oil Conservation Comm'n*, 373 P.2d 809, 814-15 (N.M. 1962).

Applying *Long* and the criteria enunciated in *Restatement (Second) Judgments* § 83, we are satisfied that the OCC's approval process is entitled to preclusive effect. As parties interested in the OCC's proceedings, the Heimanns received notice of the proposed adjudication, *see id.* § 83(2)(a), and, at least during the rehearing, were

represented by counsel, *see Long*, 840 F.2d at 751. The OCC employed trial-like procedures in which the Heimanns's enjoyed the opportunity to cross-examine Amoco's witnesses and present evidence and legal argument of their won. *See id; Restatement (Second) Judgments* § 83(2)(b). The OCC's order approving the Bravo Dome unit formulated the issues of law and fact in terms of their specific application to the Heimanns correlative rights, *see id.* § 83(2)(c), and New Mexico's procedures for appealing OCC orders provide a rule of finality specifying a point when presentations are terminated and decisions rendered final, *see id.* § 83(2)(d). Given this procedural framework, we are convinced that the OCC was acting in a judicial capacity when it approved the Bravo dome unit; its decision is therefore entitled to preclusive effect. *See City of Socorro*, 173 P. at 684-85.

IV.

Having concluded that the OCC's approval of the Bravo Dome unit is entitled to full faith and credit, we must now determine whether the Heimanns are collaterally estopped from challenging the fairness of the participation formula adopted as part of the unitization plan. Federal courts must apply the law of the state rendering the judgment to determine its collateral estoppel effect; we may not accord greater preclusive effect to a state court judgment than would the state in which the judgment is rendered. *Federal Ins. Co. v. Gates Learjet Corp.*, 823 F.2d 383, 385 (10th Cir. 1987); *see* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, Jurisdiction § 4472 (1981).

A.

This court previously has recognized that decision by state oil conservation agencies may be entitled to collateral estoppel effect. In *Chenoweth v. Pan Am. Petroleum*, 314 F.2d 63, 65 (10th Cir. 1963), a lessor of unitized mineral interests sought cancellation of an oil and gas lease. Because the participation formula had been decided upon previously by the Oklahoma Corporation Commission, we concluded that the lessor's action constituted an improper collateral attack upon the Commission's authority.

> The Oklahoma Corporation Commission has unitized the Oil Creek in this area and [plaintiffs] participate in this production under the established formula. Appellant . . . objects to this unitization order and has an appeal pending on this matter in the Supreme Court of Oklahoma. He attempts to litigate the validity of this order on this appeal, but this cannot be done under these circumstances. To do so would clearly be a collateral attack on the order of the Commission.

*Id.* Other circuits have also recognized that unitization orders by state oil conservation agencies must remain inviolate to collateral attack. *See, e.g., Katter*, 765 F.2d at 734 (Arkansas law); *Trahan v. Superior Oil*, 700 F.2d 1004, 1015-19 (5th Cir. 1983) (Louisiana law); *Mize v. Exxon*, 640 F.2d 637, 640 (5th Cir. 1981) (Alabama law). But where a subsequent action does not directly or indirectly challenge a previous order by a state oil conservation commission, collateral estoppel and res judicata do not attach. *See, e.g., Greyhound Leasing & Financial Corp. v. Joiner City Unit*, 444 F.2d 439, 445 (10th Cir. 1971) (lessor's action

against unit operator for damages caused by secondary recovery methods did not constitute collateral attack to any order of the Oklahoma Corporation Commission); *Richardson v. Phillips Petroleum*, 791 F.2d 641, 646 (8th Cir. 1986) (because denial of money damages was not necessarily encompassed in Arkansas Oil and Gas Commission's denial of injunctive relief halting secondary recovery operations, Commission's decision did not bar subsequent action for money damages).

B.

New Mexico traditionally requires four elements for the invocation of collateral estoppel: 1) the parties are the same or are privies of the original parties; 2) the cause of action is different; 3) the issue or fact was actually litigated; and 4) the issue was necessarily determined. *International Paper Co. v. Farrar*, 700 P.2d 642, 644-45 (N.M. 1985). We address these criteria in turn.

Same Parties: The Heimanns were included among the designated parties who sought and obtained rehearing of the OCC's approval of the Bravo Dome unit. They were also among the persons seeking reversal of the OCC's order in the state district court and the New Mexico Supreme Court.

Different Cause of Action: The administrative proceedings before the OCC and judicial proceedings before the New Mexico courts concerning the approval of the Bravo Dome unit constituted a separate and distinct cause of action from the present action in federal court alleging bad faith on behalf of Amoco.

Issue Actually Litigated: New Mexico employees two criteria for determining whether a proposed unitization may be approved by the OCC: 1) prevention of waste and, 2) protection of correlative rights. N.M. Stat. Ann. § 70-2-11. New Mexico defines correlative rights as follows:

> "correlative rights" means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a pool to produce without waste his *just and equitable share* of the oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially *in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas* or both in the pool and, for such purposes, to use his just and equitable share of the reservoir energy.

N.M. Stat. Ann § 70-2-33(H) (emphasis supplied). Taking the plain meaning of the relevant statute, inherent among the OCC's criteria for approving a unitization plan is the fairness of the participation formula. *See also* N.M. Stat. Ann. § 70-7-6 (B) (quoted on p. 15, *supra*). In this case, the Heimanns argue that the per-acre allocation of $CO_2$ revenues under the participation agreement did not fairly represent the quantity of recoverable $CO_2$ under their property. However, they made this very same argument before the OCC which concluded that, given the available geological knowledge, acreage was an appropriate criterion for the participation formula. Given the express statutory obligation of the OCC to protect "correlative rights," and the Commission's finding that the per-acre allocation of Bravo Dome unit revenues protected such

rights, we must conclude that the fairness of the Bravo Dome Unit participation plan was "actually litigated" before the OCC. *See Chenoweth*, 314 F.2d at 65; *Katter*, 765 F.2d at 734.

Issue Necessarily Determined: Although New Mexico accords preclusive effect to the adjudications of administrative agencies in subsequent judicial proceedings, in order to have such effect, the administrative findings must have addressed questions which were essential to the agency's decision. *See Rio Rancho Estates*, 624 P.2d at 504. As stated above, in order to approve a unitization plan, the OCC *must* find that the participation formula protects the correlative rights of all pertinent parties. *See* N.M. Stat. Ann. § 70-2-11. And in order to determine that the Bravo Dome unitization protected the Heimanns' correlative rights, it was essential that the OCC rule upon the fairness of the unit's participation formula.[11]

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[11] The Heimanns cite this court's recent opinion of *Leck v. Continental Oil Co.*, 892 F.2d 68 (10th Cir. 1989), for the proposition that collateral estoppel should not attach to the findings of the OCC. In *Leck*, we certified to the Oklahoma Supreme Court several questions concerning the jurisdiction of the Oklahoma Corporation Commission vis a vis the state courts. *Id.* at 68. Applying Oklahoma law, the Supreme Court held that the district court, not the Corporation Commission, had *jurisdiction* over a lessor's claim against the unit operator for breach of contract and violation of the operator's fiduciary duty to protect lessor's correlative rights. *Leck v. Continental Oil Co.*, ___ P.2d ___, No. 72,054, slip op. at 8, 10 (Okla. Nov. 28, 1989). The Oklahoma court limited its holding to the jurisdictional question and explicitly declined to address the *res judicata* or collateral estoppel effect of the prior adjudication before the

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"[C]ollateral estoppel not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980). Were this court to permit the Heimanns to relitigate issues already decided in a fair hearing by the OCC and affirmed by the New Mexico Supreme Court, we would intrude upon the jurisdiction of those two bodies. This would contravene established principles of comity and federalism and, after three levels of review, undermine judicial economy. We are convinced that the determination by the OCC and the New Mexico Supreme Court that the Bravo Dome unitization plan was fair and protected the Heimanns' correlative rights would be accorded collateral estoppel effect in the courts of New Mexico; full faith and credit requires that it be given similar treatment here.

The district court shall vacate the judgment in favor of the Heimanns and enter judgment in favor of Amoco consistent with this opinion.[12]

REVERSED and REMANDED.

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Commission. *Id.* at 8. Accordingly, to the extent that the Heimanns rely upon *Leck* to argue that collateral estoppel should not attach to the findings of the OCC, their reliance is misplaced.

[12] Because we reverse the judgement of the district court, we need not consider the additional issues raised by Amoco on appeal or address the Heimanns' cross-appeal.

**APPENDIX B**

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| AMOCO PRODUCTION COMPANY, | ) | |
| Plaintiff-Counterdefendant-Appellant and Cross-Appellee, | ) | |
| vs. | ) | |
| J. CASPER HEIMANN; OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE; HOWARD W. ROBERTSON; PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE and DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for RANDALL LYNN HEIMANN, JAY DEE HEIMANN, GENE ALVIN HEIMANN and RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; and JOHNANN ADEE, in her capacity as Personal Representative of the Estate of Fred P. Heimann, deceased, | ) | Nos. 88-2070, 88-2072 88-2255, 88-2355 (Filed May 24, 1990) |
| Defendants-Counterclaimants-Appellees and Cross-Appellants. | ) | |

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CV-84-1430)

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William F. Carr (Michael B. Campbell & John H. Bemis, with him on the brief), Campbell & Black, Santa Fe, New Mexico, for Plaintiff-Counterdefendant-Appellant and Cross-Appellee.

Steven L. Tucker (Jerry Wertheim & Arturo L. Jaramillo, with him on the brief), Jones, Snead, Wertheim, Rodriguez & Wentworth, Santa Fe, New Mexico, for Defendants-Counterclaimants-Appellees and Cross-Appellants.

Charles L. Kaiser and Mary A. Viviano, Davis, Graham & Stubbs, Denver, Colorado, filed an amicus curiae brief for the Rocky Mountain Oil and Gas Association.

Paul A. Cooter, Rodey, Dickason, Sloan, Akin & Robb, Santa Fe, New Mexico, filed an amicus curiae brief for the New Mexico Oil and Gas Association.

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Before SEYMOUR and BALDOCK, Circuit Judges, and THEIS, District Judge.*

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BALDOCK, Circuit Judge.

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Amoco Production Company (Amoco) appeals from a $4 million judgment arising out of its unitization of a carbon dioxide field in northeastern New Mexico. Amoco argues, *inter alia*, that the district court 1) misinstructed

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*The Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

the jury on an oil or gas lessee's duty of good faith, and 2) improperly failed to accord collateral estoppel effect to the findings of the New Mexico Oil Conservation Commission (OCC). Our jurisdiction over this diversity case arises under 28 U.S.C. § 1291. We hold that 1) a good faith inquiry into an oil and gas lessee's conduct is unnecessary where the unitization previously was approved by an independent state agency which passes on the fairness of the participation formula, such as the OCC, and 2) the OCC's approval of the unitization plan in this case has collateral estoppel effect upon the appellees' challenge to the unit's allocation formula. Accordingly, we reverse.

I.

Defendants-Counterclaimants-Appellees (the Heimanns) are a family of ranchers who have lived in northeastern New Mexico since the early part of this century. The Heimanns own 48,120 acres of ranch land in Union, Quay and Harding Counties, New Mexico. Between 1971 and 1974, the Heimanns executed three carbon dioxide ($CO_2$) and mineral leases with Amoco. Each of these three leases contained a unitization clause which granted Amoco the right to unitize the Heimanns' mineral interests with other lands in the area, subject to approval "by any governmental authority." The leases granted the Heimanns a one-eighth royalty of the net proceeds received from all oil, gas or $CO_2$ produced on their lands.

In the late 1970's, Amoco embarked upon a plan to pipe $CO_2$ from northern New Mexico to its west Texas oil

fields in order to enhance recovery there. Amoco therefore sought to unitize the mineral rights to approximately 1,174,225 acres of land in Harding, Union and Quay Counties, including the Heimanns's land.[1] The proposed agreement for the "Bravo Dome" unit allocated royalties on the basis of "surface acreage;" production was allocated according to the total surface areas contained in each tract. Amoco sought approval of the Bravo Dome unit from the OCC.[2] The Commission found that "approval of the proposed unit agreement should promote the preventions of waste and the protection of correlative rights within the unit area" and consequently approved the unit agreement. *Amoco Prod. Co.*, No. R-6446, unpub. order at 1 (N.M. Oil. Conservation Comm'n Aug. 14, 1980).

Together with other opponents of the Bravo Dome unit, all represented by counsel, the Heimanns successfully petitioned the OCC for rehearing. On October 9, 1980, the Heimanns and other opponents of the unit appeared before the OCC and presented evidence that the per-acre participation formula did not protect their correlative rights. The OCC found in pertinent part:

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[1] Amoco held a 74% working interest in the unitized lands.

[2] Although its name might suggest otherwise, the New Mexico Oil Conservation Commission and its parent, the Oil Conservation Division, maintain jurisdiction over carbon dioxide resources as well as hydrocarbons. N.M. Stat. Ann. § 70-2-34. Under New Mexico law, the same provisions which relate to natural gas apply to $CO_2$, insofar as they are applicible. *Id.*

(14) That are evidence presented demonstrated that there are two methods of participation which would protect the correlative rights of the owners within exploratory units through the distribution of production or proceeds therefrom from the unit; these methods are as follows:

(a) a formula which provides that each owner in the unit shall share in the production from any well(s) within the unit in the same proportion as each owner's acreage interest in the unit bears to the total unit acreage, and

(b) a method which provides for the establishment of participating areas within the unit based upon completion of commercial wells and geologic and engineering interpretation of presumed productive acreage with only those parties of interest within designated participating areas sharing in production. Such participation would be based upon the proportion of such owner's acreage interest within the participating area as compared to the total acreage within the participating area.

(15) That each of the methods described in Finding No. (14) above was demonstrated to have certain advantages and limitations.

(16) That there was no evidence upon which to base a finding that either method was clearly superior upon its own merits in this case at this time.

(17) That the method of sharing the income from production from the unit as provided in the Unit Agreement is reasonable and appropriate at this time.

. . .

(25) That the evidence presented in this case establishes that the unit agreement at least initially provides for development of the unit area in a method that will serve to prevent waste which is fair to the owners of interests therein.

. . . .

*Amoco Prod. Co.*, No. R-6446-B, unpub. order at 3-4 (N.M. Oil. Conservation Comm'n Jan. 23, 1981).

The Heimanns appealed the OCC's order on rehearing to the New Mexico state district court for Taos County. They argued that there was not substantial evidence supporting the OCC's determination that the proposed unitization would protect their correlative rights. The district court, however, affirmed the Commission. *Casados v. Oil Conservation Comm'n*, No. 81-176, unpub. order at 4 (N.M. 8th Dist. Apr. 5, 1982). The Heimanns appealed the district court's order to the New Mexico Supreme Court which affirmed. *Casados v. Oil Conservation Comm'n*, No. 14,359, unpub. order at 8 (N.M. Nov. 10, 1983). The Supreme Court held that the record contained "substantial evidence in the record supporting the Commission's conclusion that the correlative rights of all property owners in the Bravo Dome Unit area will be protected." *Id.*

In 1984, Amoco filed suit against the Heimanns in federal district court seeking a declaratory judgment under 28 U.S.C. § 2201(a) that Amoco had properly unitized the interests covered under the leases. The Heimanns counterclaimed alleging three theories of recovery: 1) unfair allocation of royalties under the unitization agreement; 2) undervaluation of the extracted

$CO_2$; and 3) surface damage. At the conclusion of the trial, the court instructed the jury on the components of Amoco's good faith duty which it was obliged to follow in exercising its powers under the unitization clause:

INSTRUCTION NO. 18

> Amoco's duty of good faith is not fulfilled merely by refraining from dishonest conduct. Rather, Amoco has certain affirmative duties which it must fulfill as a prerequisite to a finding of good faith. These are:
>
> (a) Disclosure to the Heimanns of the material facts affecting their interest in the proposed unitization, including the geological and geophysical characteristics of their lands compared with that of other lands within the proposed unit area, and the significance of that data as it affects the Heimanns' interest;
>
> (b) Cooperation with the Heimanns in planning the unitization program. Such cooperation may consist of communicating to the extent possible with the Heimanns in an effort to impart pertinent knowledge to the Heimanns; and
>
> (c) Disclosure to the Heimanns of any interests of Amoco in unitization which were adverse to the interest of the Heimanns.

The jury returned a special verdict in favor of Amoco on the fair market value and surface damage claims, but found for the Heimanns on the royalty allocation charge. The jury awarded the Heimanns damages in the amount of $3,500,000 compensatory damages and $500,000 punitive damages. The district court then held that Amoco had violated its duty of good faith and declared the unitization of the Heimanns lands void.

II.

Unitization refers to the consolidation of mineral or leasehold interests in oil or gas covering a common source of supply.[3] 1 B. Kramer & P. Martin, *The Law of Pooling and Unitization* § 1.02 at 1-3 (3d ed. 1989); *see Parkin v. Corporation Comm'n of Kansas*, 677 P.2d 991, 1002 (Kan. 1984). Unitization resulted from state legislatures' efforts to modify the rule of capture which had previously been applied to oil and gas law. *See Clark Oil Prod. Co. v. Hodel*, 667 F. Supp. 281, 290 (D.N.D. 1982); Kramer & Martin, *supra* p. 7, § 3.02. The goals of unitization are conserving resources by preventing waste and protecting landowners' correlative rights.[4] *See, e.g.*, N.M. Stat. Ann. § 70-2-11 (1987 Rep. Pamp.). Following unitization of an oil field, the royalty clause of a oil and gas lease generally is modified and the lessor becomes entitled to a royalty based on a pro rate share of the production attributable to its land, regardless of whether production is from that land or another tract included within the unit. Williams & Meyers, *supra* n. 2, § 951 at 694.12. The working interest

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[3] While frequently used interchangeably, the terms "pooling" and "unitization" refer to separate procedures. Pooling involves and combination of several small tracts of land to meet the spacing requirements for a single well. Unitization refers to field-wide or partial field-wide operation of a producing reservoir involving multiple adjoining land tracts. 6 H. Williams & C. Meyers, *Oil and Gas Law* § 901 at 2 (1989); R. Hemingway, *Law of Oil and Gas* § 7.13 (1983).

[4] "Correlative rights" are "rights which one owner possesses in a common source of supply in relation to those rights possessed by other owners in the same common source of supply." *United Petroleum Exploration v. Premier Resources*, 511 F. Supp. 127, 129 (W.D. Okla. 1980).

owners' share is based on a participation formula calculated from geological, physical and economic data. Kramer & Martin, *supra* p. 7, § 17.02[5]. No single method of calculating the participation formula is appropriate for all situations, Williams & Meyers, *supra* n. 2, § 970 at 816.5, and although the most frequently employed basis for allocating unitized production is surface acreage, *id.* § 970.1 at 816.6, arriving at a perfect participation agreement is impossible. Kramer & Martin, *supra* p. 7, § 17.02[5][a] at 17-16. As this court has explained:

> The percentage of an estimated pool recovery under a unitized operation assigned to a particular lease represents at best only an estimated contribution from that tract under a single unitized operation. Without more, it cannot be taken as evidence of the estimated recovery therefrom under an independent, individual operation of the lease.

*Stanolind Oil & Gas Co. v. Sellers*, 174 F.2d 948, 956 (10th Cir.), *cert. denied*, 338 U.S. 867 (1949).

Two methods exist where by separately-owned tracts can be combined in a single unit: voluntary unitization by contract or forced unitization by regulatory authority. *See* Douglass, *Powers and Problems of Lessee Pooling*, 34 Sw. Legal Fed'n Oil & Gas Inst. 231 (1983). Because the Bravo Dome unit resulted from Amoco's voluntary petition to the OCC, we concern ourselves here with voluntary unitization.

The unitization clause of an oil and gas lease grants the lessee the power to unitize the lessors interest without further consent by the lessor.[5] Kramer & Martin, *supra*

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[5] Such clauses can be said to effectuate voluntary pooling or unitization in that the pooling or unitization is not

(Continued on following page)

p. 7, § 8.01 at 8-1; Hemingway, *supra* n. 2, § 7.13. Without such a clause, the lessee has no authority to pool or unitize the interests of the lessor. Kramer & Martin, *supra* p. 7, § 8.01 at 8-2. *See also Celsius Energy Co. v. Mid Am. Petroleum*, 894 F.2d 1238, 1240 (10th Cir. 1990) (language of lease determines extent of lessee's pooling authority). Because neither the lessor nor the lessee usually know the relevant facts concerning the need for unitization at the time the lease is signed, unitization clause must be framed in general terms. *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 933 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955); Kramer & Martin, *supra* p. 7, § 8.01 at 8-2; Hemingway, *supra* n. 2, § 7.13 (unitization clauses in oil and gas leases are to be interpreted liberally). *But see Leonard v. Barnes*, 404 P.2d 292, 301 (N.M. 1965) (where an oil and gas lease contains no express provision to unitize, courts will not strain to interpret contract to provide for unitization or pooling).

In addition to contractual limitations on the exercise of the lessee's unitization power, an oil and gas lessee owes the lessor the additional duty of fair dealing, often stated in terms of good faith. Kramer & Martin, *supra* p. 7, § 8.06 at 8-32; Hemingway, *supra* n. 2, § 7.13. In *Boone v. Kerr-McGee Oil Indus.*, 217 F.2d 63 (10th Cir. 1954), this court explained that the good faith duty is necessary

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(Continued from previous page)

compelled by state authority. On the other hand, because such clauses inevitably vest the lessee with the unilateral power to pool or unitize, the pooling or unitization implemented under such clauses is not voluntary for the lessor. *See* Kramer & Martin, *supra* p. 7, § 8.02 at 8-2.

because of the unilateral power vested in the lessee by a unitization clause:

> Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for the exercise of such power. All the authorities are to this effect.
>
> In approaching a consideration of this question, we keep in mind a further principle and that is that the law presumes that men will act honestly and fairly in dealing with each other. In other words, the law presumes honest and fair dealing, and bad faith or fraud is never presumed and must be established affirmatively.

*Id.* at 65 (footnote omitted). In *Peterson*, we further explained the good faith duty of oil and gas lessees in effectuating voluntary unitization agreements:

> A lessee is bound by implied covenants in the lease to diligently explore and develop the lease, and to do so under a fair unitization plan, if unitization is effected; to market the production if the oil and gas is found in paying quantities; to do that which an operator of ordinary prudence, having due regard for the interests of both the lessor and the lessee, would do; and, in case of unitization to act fairly and in good faith, with due regard for the lessors' interests, and to provide for a fair apportionment of the oil produced.

218 F.2d at 934 (footnote omitted). Because the unitization plan at issue in *Peterson* increased efficiency of oil production, we held the lessee's unitization to be in good faith. *Id.*

A lessee's good faith is often called into question when the pooling or unitization power is exercised close to the end of the primary term, Kramer & Martin, *supra* p. 7, § 8.06[2]; *see, e.g., Amoco Prod. Co. v. Underwood*, 558 S.W.2d 509, 512-13 (Tex. Civ. App. 1977) (where unit established solely to retain leases that would otherwise expire, lessee acted in bad faith); *but see Boone*, 217 F.2d at 65-66 (mere fact that only a few months remained in lease at time of unitization did not constitute bad faith), when the lessee includes nonproductive land in the unit, Kramer & Martin, *supra* p. 7, § 8.06[2]; *see, e.g., Southwest Gas Prod. Co. v. Seale*, 191 So.2d 115, 121 (Miss. 1966), or when the lessee's economic interests are antagonistic to those of the lessor, Kramer & Martin, *supra* p. 7, § 8.06[2]. However, when and how to drill usually remains the prerogative of the driller; a mere exercise of that power contrary to the desires of the lessors or the weight of geological opinion does not, in itself, show a lack, of good faith. *Diggs v. Cities Serv. Oil Co.*, 241 F.2d 425, 427 & n.2 (10th Cir. 1957). Moreover, although the lessee's duty of good faith requires that it take the lessor's interest into account in exercising its powers under the unitization clause, the lessee need not subordinate its interest entirely to those of the lessor. *See Elliott v. Davis*, 553 S.W. 2d 223, 226-27 (Tex. Civ. App. 1977). Thus, although the lessee's good faith duty has at times been referred to as fiduciary, such standard is altogether too strict. *See Amoco Prod. Co. v. Jacobs*, 746 F.2d 1394, 1398-99 (10th Cir. 1984); *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 206 (Tex. App. 1986).

A.

The district court understandably relied upon this court's opinion in *Jacobs* for the proposition that, in order to satisfy the duty of good faith, a lessee must: 1) disclose geological facts affecting the lessor's interest in the unitization; 2) cooperate with the lessor in planning the unitization; and 3) disclose any interest in the unitization adverse to the lessor. While *Jacobs* contains language that can be read to support this view, 746 F.2d at 1401, we cannot determine from the text of the opinion whether the court actually intended to create such an expansive definition of good faith.[6] After consulting *Boone, Peterson* and other cases and authorities on unitization, however, we conclude for the reasons stated below that *Jacobs* did not intend to create such an unprecedented rule of good faith.

Although inclusion of geologically inferior land in the Bravo Dome unit by lessee Amoco could violate its duty of good faith, no authority imposes a duty upon lessees to produce and disclose geologic facts to a lessor

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[6] We are not alone in our inability to decipher *Jacob's* holding; several scholarly works have expressed similar difficulty. *See, e.g.*, Kramer & Martin, *supra* p. 7, § 17.01 at 17-3 n.4 (criticizing *Jacobs*); E. Kuntz, J. Lowe, O. Anderson & E. Smith, *Cases and Materials on Oil and Gas Law*, 744 (1986) (suggesting students read *Jacobs* "[f]or a case illustrating the difficulty courts have in dealing with this question [of good faith]"). Moreover, it is apparent that the district court shared our confusion over *Jacobs* when it informed counsel: "[B]eing very frank with you, both you gentlemen on both sides are apparently . . . as confused on what [*Jacobs*] said as I am." Rec. vol. IV at 350.

comparing the lessor's mineral interests to those in the rest of the unit. Under New Mexico law, an oil or gas lease must be given the legal affect resulting from the language within the four corners of the instrument, absent ambiguity. *See Owens v. Superior Oil Co.*, 730 P.2d 458, 459 (N.M. 1986). Because the Heimanns assented to a lease which unequivocally granted Amoco the power to unitize, subject to approval by governmental authority, we decline to stray beyond the four corners of the lease to impose upon Amoco a duty to cooperate with the lessor in planning its unitization. If Amoco operated the Bravo Dome unit in a manner adverse to the Heimanns' interest, such conduct might constitute bad faith. However, no authority imposes an affirmative duty upon a lessee to disclose every interest in a unitization adverse to the lessor and we decline to create one here.

While we understand how the district court, relying upon the equivocal language in *Jacobs*, reasonably could conclude that its Instruction No. 18 correctly stated the lessee's duty of good faith, we conclude that the court's instruction was too broad. Because we hold that the OCC's approval of the Bravo Dome unit renders the good faith inquiry unnecessary in this case, we do not address whether the erroneous instruction prejudiced Amoco.

B.

A good faith duty is imposed where unbridled discretion is vested in an oil or gas lessee by a unitization clause. *See Boone*, 217 F.2d at 65. If a lessee had complete discretion in unitizing an oil or gas field, the lessee

might, in bad faith, combine lessor's land with less productive land, calculate a production formula which underrepresents the lessor's mineral interest, or unitize solely to avoid the termination of a lease. But where a neutral and detached agency approves a proposed unitization after undertaking an extensive and independent study of geological, physical and economic data, the agency normally will constrain such abuses by a lessee. *See Celsius Energy*, 894 F.2d at 1240 (good faith requirement imposed to limit lessee's broad authority under pooling clauses).

A good faith duty also may serve to assure the fair allocation of oil and gas produced by the unit. *See Phillips*, 218 F.2d at 934. Where the lessee maintains complete discretion in formulating a unitization plan, the lessee might abuse that discretion and select a participation formula which underrepresents the contribution to the unit from the lessor's land. However, where an agency such as the OCC passes upon the fairness of a proposed participation formula, concerns of lessee unfairness are ameliorated. For unless a proposed unitization plan provides for a fair participation formula, it will not win OCC approval. *See* N.M. Stat. Ann. §§ 70-2-11, 70-2-33(H); *see also* N.M. Stat. Ann. § 70-7-6 (B) (approval criteria under Statutory Unitization Act).

Evaluating the statutory framework behind the OCC, we are convinced that it ameliorates the danger of lessee unfairness which gave rise to the good faith duty. Where approval of a unitization plan is finally determined by the OCC, the dangers resulting from the lessee's complete discretion which concerned this court in *Boone* are absent. *See also Celsius Energy*, slip op. at 6. And where the OCC

approves the participation formula after a careful and independent inquiry into the relevant geophysical and economic criteria, a fair allocation of proceeds is determined without resort to the lessee's good faith duty. Therefore, because the components of a lessee's good faith duty are necessarily encompassed within the OCC's approval criteria, it is a waste of judicial resources to conduct a second good faith inquiry here.[7]

We recognize that our analysis may conflict with language in *Jacobs* suggesting that the OCC cannot, by its "blessing" of a unitization plan, rule on the question of good faith. 746 F.2d at 1403-04. However, with all due respect, we believe the Court in *Jacobs* overlooked explicit statutory language empowering the OCC to rule on the fairness of a proposed unitization plan, *see* N.M. Stat. Ann. §§ 70-2-33(H); *cf.* N.M. Stat. Ann. § 70-7-6 (B), and ignored the proper deference owed by federal courts to the findings of state administrative agencies, *see* discussion *infra* at 17-20. Given the elaborate procedures required for obtaining OCC approval of a proposed unitization, as well as the technical expertise possessed by its

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[7] We note that the Amoco-Heimann lease did not require approval by the New Mexico Oil Conservation Commission, but rather, "by any governmental authority." In holding that the OCC's approval of the Bravo Dome unit is conclusive on the issue of good faith, we therefore limit our holding to the OCC and recognize that a different result may prevail under a different statutory scheme. *See, e.g., Samson Resources Co. v. Corporation Comm'n*, 702 P.2d 19, 23 (Okla. 1985) (private action alleging good faith violation by unit operator was not precluded by Oklahoma Corporation Commission's previous approval of unit because action did not implicate correlative rights, as defined under Oklahoma law).

members, it is inaccurate to describe the Commission's approval process as a mere "blessing." *See* N.M. Stat. Ann. §§ 70-2-4 through 70-2-10. Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of a unitization plan and entitled to full faith credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said approval is conclusive on the issue of good faith. To the extent that *Jacobs* holds to the contrary, it is overruled.[8]

III.

Having concluded that a good faith inquiry is unnecessary where the fairness of a unitization plan already has been adjudged by a regulatory agency entitled to full faith and credit by a federal court, we must determine whether the OCC is entitled to such credit.

A.

Where a state agency acts in a judicial capacity, resolves facts properly before it and the parties have had an adequate opportunity to litigate, we accord the agency's decision the same preclusive effect to which it would be entitled in the state's courts. *University of Tenn.*

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[8] Because this panel opinion overrules Tenth Circuit precedent, it has been circulated among all active judges of this court. All judges agree with the panel's holding that, because Amoco's good faith was necessarily encompassed within the OCC's consideration of the Bravo Dome unit, the Commission's approval of said unitization is conclusive on the question of Amoco's good faith.

*v. Elliott*, 478 U.S. 788, 799 (1986). New Mexico has granted preclusive effect to the findings of administrative agencies acting within their proper capacity. *See State v. Rio Rancho Estates, Inc.*, 624 P.2d 502, 504 (N.M. 1981); *Property Tax Dept. v. Molycorp, Inc.*, 555 P.2d 903, 905 (N.M. 1976); *City of Socorro v. Cook*, 173 P. 682, 684-85 (N.M. 1918). However, New Mexico courts have never considered the preclusive effect of an OCC decision. Applying the standard enunciated by the New Mexico courts, we therefore consult general principles of preclusion to anticipate the effect of the OCC approval of the Bravo Dome unit.

When an agency's function resembles that of a trial court, the agency adjudication is entitled to preclusive effect. 4 K. Davis, *Administrative Law Treatise* § 21:3 at 51-52 (1983). Conversely, where the agency's action is merely ministerial, *res judicata* and collateral estoppel do not attach. *Id.* In determining whether the administrative agency was "acting in a judicial capacity," *Elliott*, 478 U.S. at 799, no single model of procedural fairness is dictated by the due process clause, *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 483 (1981). Rather, we must look to our prior cases as well as the *Restatement (Second) Judgments* § 83[9] to

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[9] The Restatement provides in pertinent part:

§ 83. Adjudicative Determination by Administrative Tribunal.

. . .

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res

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determine whether the OCC acts in a judicial capacity when it approves a proposed unitization plan.

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judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication . . .

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specific parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

. . . .

*Restatement (Second) Judgments* § 83 at 266-67 (1982).

Although this section specifically refers to "res judicata," or claim preclusion, it also applies to collateral estoppel, issue preclusion. *Id. comment b* at 270-71.

In *Long v. Laramie County Community College Dist.*, 840 F.2d 743 (10th Cir.), *cert. denied*, 109 S.Ct. 73 (1988), we held that a state college grievance committee's finding that an employee had been harassed sexually was preclusive in a subsequent action brought under 42 U.S.C. §§ 1983, 1985. Because most of the parties before the grievance committee had been represented by counsel, witnesses were cross-examined, documentary evidence was introduced in accordance with Wyoming APA and the committee rendered findings and recommendations which were reviewed by College's Board of Trustees, we concluded that the commission was acting in a judicial capacity under *Elliott*.[10] *Id.* at 751. In *Katter v. Arkansas La. Gas*, 765 F.2d 730 (8th Cir. 1985), the Eighth Circuit similarly held that an integration order by the Arkansas Oil and Gas Commission was entitled to full faith and credit in a subsequent action brought in federal court:

> Clearly the Arkansas legislature intended an adjudicatory, *in rem* order [by the Oil and Gas Commission] which, when final, would have all the force and effect of a court judgment; and in fact required and provided for all the things

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[10] Both *Elliott* and *Long* considered whether state administrative fact findings are preclusive in a *federal* cause of action. In the instant case, arising as it does under our diversity jurisdiction, under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), we must consider whether the OCC's findings are preclusive in New Mexico courts. *See Braselton v. Clearfield State Bank*, 606 F.2d 285, 287 & n. 1 (10th Cir. 1979). We therefore rely upon *Elliott* and *Long* only for general preclusion principles to help determine whether the OCC's findings would be accorded collateral estoppel effect in the courts of New Mexico.

> necessary to give it that effect. (citation omitted). In general, then, such an order would fix the parties' rights and duties as fully and finally as a court judgment – albeit here a default judgment – and would be entitled to the same full faith and credit and preclusive effect.

*Id.* at 734.

B.

The New Mexico Oil Conservation Commission consists of three persons: a designee of the Commissioner of Public Lands, a designee of the Secretary of Energy, Minerals and Natural Resources and the Director of the Oil Conservation Division. N.M. Stat. Ann. § 70-2-4. The two designated members must be "persons who have expertise in the regulation of petroleum production by virtue of education or training," *id.*, while the third member must either be a registered petroleum engineer or else, by virtue of education and experience, have experience in petroleum engineering. N.M. Stat. Ann. § 70-2-5(B). The OCC has authority to subpoena witnesses, compel testimony and require production of books, papers and records relative to matters within the commission's jurisdiction. N.M. Stat. Ann. § 70-2-8. OCC members may administer oaths to any witness in any proceeding; a person who testifies falsely under oath before the commission is guilty of perjury. N.M. Stat. Ann. § 70-2-10 Hearings of the OCC are held in public, N.M. Oil Conservation Div. R. 1201 (1989), after providing interested parties with notice, N.M. Oil Conservation Div. R. 1204-07, and may be initiated upon the motion of any operator, producer or person having a pertinent property interest.

N.M. Oil Conservation Div. R. 1203. All pleadings before the OCC must be mailed to adverse parties, N.M. Oil Conservation Div. R. 1208, and all testimony delivered before the Commission must be formally recorded, N.M. Oil Conservation Div. R. 1210. Any person testifying under subpoena or in support of or in opposition to a motion before the Commission must do so under oath. *Id.* The OCC's procedural rules further provide:

> Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served. No order shall be made which is not supported by competent legal evidence.

N.M. Oil Conservation Div. R. 1212. In reaching a decision, the OCC must make written findings of fact that have sufficient support in the record. *Fasken v. Oil Conservation Comm'n*, 532 P.2d 588, 590 (N.M. 1975). Any party adversely affected by an order of the Commission may petition for rehearing, N.M. Stat. Ann. § 70-2-25(A); any party dissatisfied with the disposition of the rehearing may appeal to the state district court, N.M. Stat. Ann. § 70-2-25(B), where the OCC's unitization decision is reviewed for substantial evidence, *Viking Petroleum v. Oil Conservation Comm'n*, 672 P.2d 280, 282 (N.M. 1983). Although New Mexico courts will accord "[s]pecial weight . . . to the experience, technical competence and specialized knowledge of the Commission[,]" *id.*, the OCC's findings must be based on ultimate facts involving "foundationary matters," and "basic conclusions of

fact[.]" *Continental Oil v. Oil Conservation Comm'n*, 373 P.2d 809, 814-15 (N.M. 1962).[11]

Applying *Long* and the criteria enunciated in *Restatement (Second) Judgments* § 83, we are satisfied that the OCC's approval process is entitled to preclusive effect. As parties interested in the OCC's proceedings, the Heimanns received notice of the proposed adjudication, *see id.* § 83(2)(a), and, at least during the rehearing, were represented by counsel, *see Long*, 840 F.2d at 751. The OCC employed trial-like procedures in which the Heimanns's enjoyed the opportunity to cross-examine Amoco's witnesses and present evidence and legal argument of their own. *See id; Restatement (Second) Judgments* § 83(2)(b). The OCC's order approving the Bravo Dome

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[11] *Continental Oil* contains language which, when viewed in isolation, suggests that the OCC is not acting in a judicial capacity for preclusion purposes when it approves a proposed unitization plan. 373 P.2d at 818. However, closer analysis of the holding belies such an interpretation. *Continental Oil* held: 1) that the OCC is statutorily required to engage in administrative factfinding on the question of waste and correlative rights; 2) that OCC decisions must be based on those "foundational" matters; and, 3) that separation of powers precludes courts from intruding upon the OCC's factfinding prerogatives. Whether the procedures followed by the OCC afford a sufficient degree of due process to be accorded preclusive effect in subsequent proceedings was a question that *Continental Oil* did not address. Accordingly, notwithstanding the semantic affinity of *Continental Oil* to the instant inquiry, the Heimanns' reliance upon *Continental Oil* for the proposition that OCC determinations are not entitled to preclusive effect is misplaced. *Cf. Rio Rancho Estates*, 624 P.2d at 504 (findings of New Mexico State Engineer have preclusive effect in subsequent proceedings).

unit formulated the issues of law and fact in terms of their specific application to the Heimanns correlative rights, *see id.* § 83(2)(c), and New Mexico's procedures for appealing OCC orders provide a rule of finality specifying a point when presentations are terminated and decisions rendered final, *see id.* § 83(2)(d). Given this procedural framework, we are convinced that the OCC was acting in a judicial capacity when it approved the Bravo Dome unit; its decision is therefore entitled to preclusive effect. *See City of Socorro,* 173 P. at 684-85.

IV.

Having concluded that the OCC's approval of the Bravo Dome unit is entitled to full faith and credit, we must now determine whether the Heimanns are collaterally estopped from challenging the fairness of the participation formula adopted as part of the unitization plan. Federal courts must apply the law of the state rendering the judgment to determine its collateral estoppel effect; we may not accord greater preclusive effect to a state court judgment than would the state in which the judgment is rendered. *Federal Ins. Co. v. Gates Learjet Corp.,* 823 F.2d 383, 385 (10th Cir. 1987); *see* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* Jurisdiction § 4472 (1981).

A.

This court previously has recognized that decisions by state oil conservation agencies may be entitled to collateral estoppel effect. In *Chenoweth v. Pan Am. Petroleum,* 314 F.2d 63, 65 (10th Cir. 1963), a lessor of unitized

mineral interests sought cancellation of an oil and gas lease. Because the participation formula had been decided upon previously by the Oklahoma Corporation Commission, we concluded that the lessor's action constituted an improper collateral attack upon the Commission's authority.

> The Oklahoma Corporation Commission has unitized the Oil Creek in this area and [plaintiffs] participate in this production under the established formula. Appellant . . . objects to this unitization order and has an appeal pending on this matter in the Supreme Court of Oklahoma. He attempts to litigate the validity of this order on this appeal, but this cannot be done under these circumstances. To do so would clearly be a collateral attack on the order of the Commission.

*Id.* Other circuits have also recognized that unitization orders by state oil conservation agencies must remain inviolate to collateral attack. *See, e.g., Katter,* 765 F.2d at 734 (Arkansas law); *Trahan v. Superior Oil,* 700 F.2d 1004, 1015-19 (5th Cir. 1983) (Louisiana law); *Mize v. Exxon,* 640 F.2d 637, 640 (5th Cir. 1981) (Alabama law). But where a subsequent action does not directly or indirectly challenge a previous order by a state oil conservation commission, collateral estoppel and res judicata do not attach. *See, e.g., Greyhound Leasing & Financial Corp. v. Joiner City Unit,* 444 F.2d 439, 445 (10th Cir. 1971) (lessor's action against unit operator for damages caused by secondary recovery methods did not constitute collateral attack to any order of the Oklahoma Corporation Commission); *Richardson v. Phillips Petroleum,* 791 F.2d 641, 646 (8th Cir.

1986) (because denial of money damages was not necessarily encompassed in Arkansas Oil and Gas Commission's denial of injunctive relief halting secondary recovery operations, Commission's decision did not bar subsequent action for money damages).

B.

New Mexico traditionally requires four elements for the invocation of collateral estoppel: 1) the parties are the same or are privies of the original parties; 2) the cause of action is different; 3) the issue or fact was actually litigated; and 4) the issue was necessarily determined. *International Paper Co. v. Farrar.* 700 P.2d 642, 644-45 (N.M. 1985). We address these criteria in turn.

Same Parties: The Heimanns were included among the designated parties who sought and obtained rehearing of the OCC's approval of the Bravo Dome unit. They were also among the persons seeking reversal of the OCC's order in the state district court and the New Mexico Supreme Court.

Different Cause of Action: The administrative proceedings before the OCC and judicial proceedings before the New Mexico courts concerning the approval of the Bravo Dome unit constituted a separate and distinct cause of action from the present action in federal court alleging bad faith on behalf of Amoco.

Issue Actually Litigated: New Mexico employs two criteria for determining whether a proposed unitization may be approved by the OCC: 1) prevention of waste and, 2) protection of correlative rights. N.M. Stat. Ann.

§ 70-2-11. New Mexico defines correlative rights as follows:

> "correlative rights" means the opportunity afforded, so far as is practicable to do so, to the owner of each property in a pool to produce without waste his *just and equitable share* of the oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially *in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas* or both in the pool and, for such purposes, to use his just and equitable share of the reservoir energy.

N.M. Stat. Ann. § 70-2-33(H) (emphasis supplied). Taking the plain meaning of the relevant statute, inherent among the OCC's criteria for approving a unitization plan is the fairness of the participation formula. *See id.; accord* N.M. Stat. Ann. § 70-7-6 (B). In this case, the Heimanns argue that the per-acre allocation of $CO_2$ revenues under the participation agreement did not fairly represent the quantity of recoverable $CO_2$ under their property. However, they made this very same argument before the OCC which concluded that, given the available geological knowledge, acreage was an appropriate criterion for the participation formula. Given the express statutory obligation of the OCC to protect "correlative rights," and the Commission's finding that the per-acre allocation of Bravo Dome unit revenues protected such rights, we must conclude that the fairness of the Bravo Dome Unit participation plan was "actually litigated" before the OCC. *See Chenoweth*, 314 F.2d at 65; *Katter*, 765 F.2d at 734.

Issue Necessarily Determined: Although New Mexico accords preclusive effect to the adjudications of administrative agencies in subsequent judicial proceedings, in order to have such effect, the administrative findings must have addressed questions which were essential to the agency's decision. *See Rio Rancho Estates*. 624 P.2d at 504. As stated above, in order to approve a unitization plan, the OCC *must* find that the participation formula protects the correlative rights of all pertinent parties. *See* N.M. Stat. Ann. § 70-2-11. And in order to determine that the Bravo Dome unitization protected the Heimanns' correlative rights, it was essential that the OCC rule upon the fairness of the unit's participation formula.[12]

"[C]ollateral estoppel not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also

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[12] The Heimanns cite this court's recent opinion of *Leck v. Continental Oil Co.*, 892 F.2d 68 (10th Cir. 1989), for the proposition that collateral estoppel should not attach to the findings of the OCC. In *Leck*, we certified to the Oklahoma Supreme Court several questions concerning the jurisdiction of the Oklahoma Corporation Commission vis a vis the state courts. *Id.* at 68. Applying Oklahoma law, the Supreme Court held that the district court, not the Corporation Commission, had *jurisdiction* over a lessor's claim against the unit operator for breach of contract and violation of the operator's fiduciary duty to protect lessor's correlative rights. *Leck v. Continental Oil Co.*, ___ P.2d ___, No. 72,054, slip op. at 8, 10 (Okla. Nov. 28, 1989). The Oklahoma court limited its holding to the jurisdictional question and explicitly declined to address the *res judicata* or collateral estoppel effect of the prior adjudication before the Commission. *Id.* at 8. Accordingly, to the extent that the Heimanns rely upon *Leck* to argue that collateral estoppel should not attach to the findings of the OCC, their reliance is misplaced.

promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980). Were this court to permit the Heimanns to relitigate issues already decided in a fair hearing by the OCC and affirmed by the New Mexico Supreme Court, we would intrude upon the jurisdiction of those two bodies. This would contravene established principles of comity and federalism and, after three levels of review, undermine judicial economy. We are convinced that the determination by the OCC and the New Mexico Supreme Court that the Bravo Dome unitization plan was fair and protected the Heimanns' correlative rights would be accorded collateral estoppel effect in the courts of New Mexico; full faith and credit requires that it be given similar treatment here.

The district court shall vacate the judgment in favor of the Heimanns and enter judgment in favor of Amoco consistent with this opinion.[13]

REVERSED and REMANDED.

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[13] Because we reverse the judgment of the district court, we need not consider the additional issues raised by Amoco on appeal or address the Heimanns' cross-appeal.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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AMOCO PRODUCTION COMPANY,

Plaintiff-Counter-defendant-Appellant, Cross-Appellee,

v.

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE; HOWARD W. ROBERTSON; PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE; DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for; RANDALL LYNNE HEIMANN; JAY DEE HEIMANN; GENE ALVIN HEIMANN; RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for; VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; JOHNANN ADEE, in her capacity as Personal Representative of the Estate of Fred P. Heimann, deceased,

Defendants-Counter-claimants-Appellees, Cross-Appellants.

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ROCKY MOUNTAIN OIL AND GAS ASSOCIATION; NEW MEXICO OIL & GAS ASSOCIATION

Amici Curiae.

Nos.
88-2070
88-2072
88-2055
88-2355

ORDER
Filed May 24, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, Circuit Judges, and THEIS, District Judge.*

On consideration of defendants' petition for rehearing and the response to it, we simultaneously with this order file an amended opinion. In all other respects the petition for rehearing is denied.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

* Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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|---|---|
| AMOCO PRODUCTION COMPANY,<br><br>Plaintiff-Counter-defendant-Appellant, Cross-Appellee,<br><br>vs.<br><br>J. CASPER HEIMANN; OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE; HOWARD W. ROBERTSON; PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for; SHARON ADEE; DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for; RANDALL LYNNE HEIMANN; JAY DEE HEIMANN, GENE ALVIN HEIMANN; RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for; VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; JOHNANN ADEE, in her capacity as Personal Representative of the Estate of Fred P. Heimann, deceased,<br><br>Defendants-Counter-claimants-Appellees, Cross-Appellants.<br><br>ROCKY MOUNTAIN OIL AND GAS ASSOCIATION; NEW MEXICO OIL & GAS ASSOCIATION<br><br>Amici Curiae. | Nos.<br>88-2070<br>88-2072<br>88-2055<br>88-2355 |

ORDER

Filed June 12, 1990

Before SEYMOUR and BALDOCK, Circuit Judges, and THEIS*, District Judge.

The court has for consideration in the captioned cases:

1. Appellees' second petition for rehearing;

2. Appellees' motion to stay the mandate, together with appellant's response and appellees' reply; and

3. Appellant's motion to include instructions concerning interest in the mandate, together with appellees' response.

Upon consideration whereof, the court denies appellees' second petition for rehearing.

The court also denies appellees' motion to stay the mandate, and directs the clerk to issue the mandate forthwith.

Finally, the court denies appellant's motion to include instructions concerning interest in the mandate. This denial is without prejudice to the appellant's right to bring the issue of interest before the district court when that court enters judgment in favor of the appellant,

* Honorable Frank G. Theis, Senior United District Judge for the District of Kansas, sitting by designation.

Amoco Production Company, pursuant to this court's mandate.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk